No. 04-1244
Vide 04-1352

Title:	Joseph Scheidler, et al., Petitioners v. National Organization for Women, Inc., et al.
Docketed:	March 18, 2005
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Nos.:	(99-3076, 99-3336, 99-3891, 99-3892, 99-2050)
Decision Date:	February 26, 2004
Rehearing Denied:	January 28, 2005

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Mar 16 2005	Petition for a writ of certiorari filed. (Response due April 18, 2005)
Apr 14 2005	Order extending time to file response to petition to and including May 11, 2005.
Apr 16 2005	Waiver of right of respondent Operation Rescue to respond filed.
May 10 2005	Brief of respondents National Organization for Women, Inc., et al. in opposition filed. VIDED.
May 11 2005	Brief amici curiae of Consistent Life, et al. filed. VIDED.
May 11 2005	Brief amicus curiae of Concerned Women for America filed. VIDED.
May 11 2005	Brief amici curiae of Alabama, et al. filed. VIDED.
May 24 2005	DISTRIBUTED for Conference of June 9, 2005.
May 24 2005	Reply of petitioners Joseph Scheidler, et al. filed. (Distributed)
Jun 13 2005	DISTRIBUTED for Conference of June 16, 2005.
Jun 20 2005	DISTRIBUTED for Conference of June 23, 2005.
Jun 23 2005	DISTRIBUTED for Conference of June 27, 2005.
Jun 28 2005	Petition GRANTED. The case is consolidated with No. 04-1352 and a total of one hour is allotted for oral argument.
Jul 21 2005	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioner and counsel for the respondent. VIDED.
Jul 21 2005	Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including September 2, 2005. VIDED
Jul 22 2005	Motion to dispense with printing the joint appendix filed by petitioners (VIDED).
Jul 25 2005	SET FOR ARGUMENT on November 30, 2005.
Aug 5 2005	CIRCULATED.
Aug 22 2005	Motion to dispense with printing the joint appendix filed by petitioner

GRANTED.

Aug 26 2005 Brief amicus curiae of Americans United for Life filed. VIDED. (Distributed)

Aug 26 2005 Brief amicus curiae of Legal Defense for Unborn Children in support of neither party filed. VIDED. (Distributed)

Sep 1 2005 Brief amicus curiae of Pacific Legal Foundation filed. (Distributed)

Sep 1 2005 Brief amicus curiae of Life Legal Defense Foundation filed. VIDED. (Distributed)

Sep 2 2005 Brief amicus curiae of United States filed. VIDED. (Distributed)

Sep 2 2005 Brief of petitioners Joseph Scheidler, et al. filed. VIDED. (Distributed)

Sep 2 2005 Brief of petitioner Operation Rescue filed. VIDED. (Distributed)

Sep 2 2005 Brief amicus curiae of Concerned Women for America filed. VIDED. (Distributed)

Sep 2 2005 Brief amici curiae of Alabama, et al. filed. VIDED. (Distributed)

Sep 2 2005 Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. VIDED. (Distributed)

Sep 2 2005 Brief amici curiae of Consistent Life, et al. filed. VIDED. (Distributed)

Sep 15 2005 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.

Sep 15 2005 Extension of time within which to file respondents' brief on the merits to and including October 21, 2005. VIDED

Oct 20 2005 Brief amicus curiae of Emily Lyons filed. VIDED. (Distributed)

Oct 21 2005 Brief amici curiae of NARAL, et al. filed. VIDED. (Distributed)

Oct 21 2005 Brief amici curiae of Religious Coalition for Reproductive Choice, et al. filed. VIDED. (Distributed)

Oct 21 2005 Brief amici curiae of Abner Mikva and William A. Norris filed. VIDED. (Distributed)

Oct 21 2005 Brief amici curiae of Feminist Majority Foundation, et al. filed. VIDED. (Distributed)

Oct 21 2005 Brief amici curiae of 47 Members of the United States Congress filed. VIDED. (Distributed)

Oct 21 2005 Brief of respondents National Organization for Women, Inc., et al. filed. VIDED. (Distributed)

Oct 21 2005 Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. VIDED. (Distributed)

Nov 7 2005 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Nov 18 2005 Reply of petitioners Joseph Scheidler, et al. filed. VIDED. (Distributed)

Nov 18 2005 Reply of petitioner Operation Rescue filed. VIDED. (Distributed)

Nov 25 2005 Record received from U.S.C. A. for 7th Circuit. (1 box)

Nov 28 2005 Record received from U.S.D.C. for Nothern Dist. of Illinois. (11 boxes)

Nov 30 2005 Argued. For petitioners: Alan Untereiner, Washington, D.C.; and Lisa S. Blatt, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States as amicus curiae.) For repondents: Erwin Chemerinsky, Durham, N.C.

Dec 7 2005 Addtional record from U.S.C.A. 7th Circ. (1 envelope)

Supreme Court, U.S.
FILED

041244 MAR 16 2005

No.

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG,
TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
1880 S. Redwood Street
Escondido, CA 92025
(760) 737-7181

ALAN UNTEREINER*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
BRIAN WILLEN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

QUESTIONS PRESENTED

In *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court reversed a decision of the Seventh Circuit that had affirmed a civil judgment and nationwide injunction entered under the Racketeer Influenced and Corrupt Organizations Act (RICO) against various anti-abortion protesters. In reversing, this Court explained (*id.* at 411 (emphasis added in part)): "Because *all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed, the judgment* that petitioners violated RICO *must also be reversed.* Without an underlying RICO violation, the *injunction* issued by the District Court *must necessarily be vacated.*" On that basis, this Court determined that it "need not address the second question" on which certiorari had been granted, namely "whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." *Ibid.*

The questions presented are:

1. Whether the Seventh Circuit, on remand, disregarded this Court's mandate by holding that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the "injunction issued by the District Court" might *not* need to be vacated.

2. Whether the Seventh Circuit correctly held, in conflict with decisions of the Sixth and Ninth Circuits, that the Hobbs Act, 18 U.S.C. § 1951(a), can be read to punish acts or threats of physical violence against "any person or property" in a manner that "in any way or degree * * * affects commerce," even if such acts or threats of violence are wholly unconnected to either extortion or robbery.

3. Whether this Court should again grant certiorari to resolve the deep and important intercircuit conflict over whether injunctive relief is available in a private civil action for treble damages brought under RICO, 18 U.S.C. § 1964(c).

RULE 14.1(b) AND 29.6 STATEMENT

Respondent National Organization for Women, Inc. (NOW), is a party to this action on behalf of itself as well as its women members and all other women whose freedom to use the services of women's health centers in the United States that provide abortions has been or will be interfered with by unlawful activities of the petitioners. Other respondents here (plaintiffs below) are the Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., which appear on their own behalf as well as on behalf of a class of all women's health centers in the United States at which abortions are performed. Operation Rescue, a defendant below, is a respondent under S. Ct. Rule 12.6.

Petitioner Pro-Life Action League, Inc., has no parent corporation and does not issue stock to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 14.1(b) AND 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. Factual and Procedural Background 2

B. This Court's Decision in *Scheidler II* 5

C. The Seventh Circuit's Decision on Remand 6

REASONS FOR GRANTING THE PETITION 11

I. Certiorari Or Mandamus Is Warranted Because The Seventh Circuit's Decision Is Contrary To This Court's Clear Mandate 12

II. The Court Should Decide Whether The Hobbs Act Punishes Acts Or Threats Of Violence To Property Or Persons, Unconnected To Either Extortion Or Robbery 17

III. This Court Should Grant Review Again To Resolve The Circuit Split Over Whether Injunctive Relief Is Available In A Private RICO Action 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases:

Agency Holding Corp. v. *Malley-Duff & Assocs.*,
483 U.S. 143 (1987) 29

Baltimore & Ohio R.R. v. *United States*,
279 U.S. 781 (1929) 13

Bennett v. *Berg*, 710 F.2d 1361 (8th Cir.) (en banc),
cert. denied, 464 U.S. 1008 (1983) 28

Cedric Kushner Promotions, Ltd. v. *King*,
533 U.S. 158 (2001) 29

Evans v. *United States*, 504 U.S. 255 (1992) 23

Feminist Women's Health Ctr. v. *Codispoti*,
63 F.3d 863 (9th Cir. 1995) 23

Hohn v. *United States*, 524 U.S. 236 (1998) 13, 14

Holmes v. *SIPC*, 503 U.S. 258 (1992) 29

In re Managed Care Litigation, 298 F. Supp. 2d 1259
(S.D. Fla. 2003) 27

In re Sanford Fork & Tool Co.,
160 U.S. 247 (1895) 13

Koons Buick Pontiac GMC, Inc. v. *Nigh*,
125 S. Ct. 460 (2004) 30

Libertad v. *Welch*,
53 F.3d 428 (1st Cir. 1995) 19, 23

TABLE OF AUTHORITIES—Continued

Page(s)

Lincoln House, Inc. v. *Dupre*,
903 F.2d 845 (1st Cir. 1990) 28

Motorola Credit Corp. v. *Uzan*, 202 F. Supp. 2d 239
(S.D.N.Y. 2002), remanded, 322 F.3d 130
(2d Cir. 2003) 27

Muniz v. *Hoffman*, 422 U.S. 454 (1975) 22

National Organization for Women, Inc. v. *Scheidler*,
510 U.S. 249 (1994) 1, 4

Palmetto State Med. Ctr., Inc. v. *Operation Lifeline*,
117 F.3d 142 (4th Cir. 1997) 23

Parks v. *Simpson Timber Co.*,
389 U.S. 909 (1967) 14

Perkins v. *Fourniquet*, 55 U.S. 328 (1852) 14

Piper Aircraft Co. v. *Reyno*,
454 U.S. 235 (1981) 17

Ratzlaf v. *United States*, 510 U.S. 135 (1994) 21

Religious Technology Ctr. v. *Wollersheim*,
796 F.2d 1076 (9th Cir. 1986), cert.
denied, 479 U.S. 1103 (1987) 27, 28, 29

Rotella v. *Wood*, 528 U.S. 549 (2000) 29

Scheidler v. *National Organization for Women, Inc.*,
537 U.S. 393 (2003) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Sedima, S.P.R.L. v. *Imrex Co.*,
473 U.S. 479 (1985) 22

Steel Co. v. *Citizens for a Better Environment*,
523 U.S. 83 (1998) 28, 29

Stirone v. *United States*, 361 U.S. 212 (1960) .. 9, 21, 24, 25

Town of West Hartford v. *Operation Rescue*,
915 F.2d 92 (2d Cir. 1990) 19

Union Trust Co. v. *Eastern Air Lines, Inc.*,
350 U.S. 962 (1956) 14

United States v. *Anderson*,
716 F.2d 446 (7th Cir. 1983) 19

United States v. *Bailey*,
990 F.2d 119 (4th Cir. 1993) 24, 25

United States v. *Cook*, 384 U.S. 257 (1966) 22

United States v. *Enmons*,
410 U.S. 396 (1973) 19, 20, 26

United States v. *Fossatt*, 62 U.S. 445 (1858) 14

United States v. *Franks*,
511 F.2d 25 (6th Cir. 1975) 9, 18, 25

United States v. *Milton*, 1998 WL 468812
(4th Cir. Aug. 4, 1998) 9, 18, 24, 25

United States v. *Ryder*, 110 U.S. 729 (1884) 22

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Yankowski*,
184 F.3d 1071 (9th Cir. 1999) ..... *passim*

Statutes and Rule:

18 U.S.C. App. (Revisers' Notes) (1948) 22

18 U.S.C. § 1951 ..... *passim*

18 U.S.C. § 1951(a) 8, 20, 24

18 U.S.C. § 1951(b)(2) 5, 19

18 U.S.C. § 1951(b)(3) 23

18 U.S.C. § 1952(b) 4

18 U.S.C. § 1961 *et seq.* 1

18 U.S.C. § 1961(1)(A) 4

18 U.S.C. § 1962(c) 3, 4

18 U.S.C. § 1964 ..... 6, 12

18 U.S.C. § 1964(c) 4, 26

28 U.S.C. § 1254(1) 1, 13

28 U.S.C. § 1651 ..... 1, 14

42 U.S.C. § 11046(a)(1) 28, 29

TABLE OF AUTHORITIES—Continued

Page(s)

42 U.S.C. § 11046(c) 28, 29

Pub. L. No. 486, 60 Stat. 40 (1946) 10

New York Penal Law § 530 (1909) 6

S. Ct. Rule 14.1(a) 14, 16

Miscellaneous:

Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439 (1948-1949) 22, 23

Bradley, *NOW v. Scheidler: RICO Meets The First Amendment*, 1994 SUP. CT. REV. 129 (1994) 26

U.S. DEPT. OF JUSTICE, CRIMINAL RESOURCE MANUAL (1997) 25

Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815 (1988) 23

R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE (8th ed. 2002) 13, 14, 17

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals denying rehearing (App., *infra*, 1a-24a) is reported at 396 F.3d 807. The previous order of the court of appeals on remand (App., *infra*, 25a-29a) from this Court is unreported. The earlier opinion of the court of appeals (App., *infra*, 30a-61a), which this Court reversed, is reported at 267 F.3d 687. The district court's opinion disposing of the motion to dismiss the third amended complaint (App., *infra*, 62a-140a) is reported at 897 F. Supp. 1047. The district court's opinion denying post-trial motions and entering an injunction (App., *infra*, 141a-174a) is unreported.

JURISDICTION

The court of appeals entered its order on remand on February 26, 2004, and denied rehearing on January 28, 2005. App., *infra*, 1a, 25a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This Court's jurisdiction to review the first issue presented is also invoked under 28 U.S.C. § 1651.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Hobbs Act, 18 U.S.C. § 1951, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, are set forth at App., *infra*, 175a-177a.

STATEMENT

This truly is a case of "déjà vu all over again." More than two years ago, this Court issued its second decision in this long-running litigation involving the controversial use of civil RICO against individuals and organizations engaged in vigorous protests against abortion clinics. *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) (*Scheidler II*); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*Scheidler I*). In *Scheidler II*, the Court to all appearances brought this case to an end by holding that the

political protesters' mere interference with others' property or liberty interests, without any showing of wrongful "obtaining" of another's "property," does not constitute extortion in violation of the Hobbs Act. The Court therefore reversed the judgment of RICO liability, which had rested on 121 purported predicate acts, including violations (and attempted violations) of the Hobbs Act, the Travel Act, and state extortion law. 537 U.S. at 397. The Court explained that its "determination with respect to extortion under the Hobbs Act" "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Ibid.* "Because *all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," the Court instructed, "the *judgment* that petitioners violated RICO *must also be reversed*" and the injunction "*must necessarily be vacated.*" *Id.* at 411 (emphasis added).

On remand, a panel has ruled that, notwithstanding this Court's directives, "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, the RICO judgment was *not* necessarily reversed, and the injunction issued by the district court might *not* need to be vacated after all. The panel also concluded, for good measure, that the Hobbs Act might well criminalize the protesters' activities. Accordingly, the panel remanded the case to the district court to determine whether four predicate acts that the panel viewed as unaffected by this Court's decision could provide a basis for maintaining a RICO injunction against the protesters. App., *infra*, 7a-8a, 15a-16a, 28a-29a. Further review is warranted to bring the Seventh Circuit into compliance with this Court's mandate as well as to resolve significant conflicts on several of the issues presented.

A. Factual and Procedural Background

1. Petitioners Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are individuals who oppose abortion on moral and religious grounds. Petitioner Pro-Life Action League, Inc. (PLAL), is a nonprofit Illinois corporation. Respondents the

National Organization for Women, Inc. (NOW), Delaware Women's Health Organization, Inc. (DWHO), and Summit Women's Health Organization, Inc. (Summit) are, respectively, a national nonprofit organization that supports the legal availability of abortion and two affiliated clinics that perform abortions.

Some 19 years ago, respondents initiated this lawsuit against petitioners and various other individuals and entities.[1] Respondents asserted claims on behalf of two putative nationwide classes: all women's health centers at which abortions are performed (represented by DWHO and Summit); and non-NOW members whose freedom to use the services of such abortion clinics has been or will be interfered with by the unlawful activities of petitioners (represented by NOW). NOW also claimed organizational standing to advance similar claims for its own members. Respondents alleged, among other things, violations of RICO and of state law.

In their RICO claims, respondents alleged that petitioners and Operation Rescue had formed a loose association-in-fact of individuals and groups known as the Pro-Life Action Network (PLAN), united by a common ideological purpose of opposing abortion. They further alleged that PLAN was a RICO "enterprise" and that petitioners, by engaging in protests aimed at closing abortion clinics, had directly or indirectly participated in the conduct of PLAN's activities through a "pattern" of "racketeering activity" (18 U.S.C. § 1962(c)) that included acts of "extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951. Respondents requested treble damages, costs, attorneys' fees, and (under the antitrust laws but not under RICO) an injunction.

In 1991, the district court dismissed the complaint for failure to state a valid claim, 765 F. Supp. 937, and the Seventh Circuit affirmed, 968 F.2d 612 (1992). In upholding the

---

[1] Except for Operation Rescue, all of the other individuals and entities ceased to be defendants before trial. See also page ii, *supra*. References to "respondents" throughout this brief do not include Operation Rescue.

dismissal of the RICO claims, the court of appeals held that RICO does not apply to defendants who commit "non-economic crimes * * * in furtherance of non-economic motives." *Id.* at 629. This Court granted certiorari on the "economic motive" issue, 508 U.S. 971 (1993), and reversed, 510 U.S. 249 (1994).

2. Following remand to the trial court, respondents filed a third amended complaint. For the first time, they requested injunctive relief under RICO. In 1995, the trial court dismissed the claims against certain defendants, but not the remaining RICO claims against petitioners. App., *infra*, 140a. The court also held that respondents, as private parties, could obtain injunctive relief in a treble-damages action brought under RICO, 18 U.S.C. § 1964(c). App., *infra*, 119a-122a.

3. The case was tried from March 4 to April 20, 1998. Evidence was presented concerning numerous incidents spanning the nationwide conduct of petitioners and thousands of other abortion protesters over a 15-year period. App., *infra*, 33a ("hundreds of acts"). The jury returned a verdict for respondents on their RICO claim under Section 1962(c).

The jury found, among other things, that petitioners and Operation Rescue or unnamed persons "associated with PLAN" had committed 121 predicate acts under RICO: 21 "[a]cts or threats involving extortion against a[] patient, prospective patient, doctor, nurse, or clinic employee" in violation of the Hobbs Act, 18 U.S.C. § 1951; 25 violations of state extortion law (defined in essentially the same way as Hobbs Act extortion); 25 acts of conspiracy to violate federal or state extortion law; 23 extortion-related violations of the Travel Act, see 18 U.S.C. §§ 1952(b), 1961(1)(A); 23 attempts to violate the Travel Act; and 4 acts or threats of physical violence to any person or property in violation of the Hobbs Act, 18 U.S.C. § 1951.[2]

---

[2] The jury instructions defined "property" broadly for purposes of all of the Hobbs Act counts to include "anything of value, including a woman's right to seek services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to

The jury awarded $31,455.64 to DWHO in damages and $54,471.28 to Summit; pursuant to RICO, the damages were trebled. The court later denied post-trial motions and entered a broad nationwide injunction regulating petitioners' future protest activities at abortion clinics. App., *infra*, 141a-174a.

4. The Seventh Circuit affirmed. App., *infra*, 30a-61a. In holding that injunctive relief is available to a private litigant suing under RICO, the court openly disagreed with the Ninth Circuit. *Id.* at 35a-43a. The court also rejected petitioners' arguments that they could not have violated the Hobbs Act because, among other things, they had not "obtained" any "property" of the clinics, the doctors who worked there, or the clinics' customers. *Id.* at 58a-59a. The court asserted that the clinics' "intangible property * * * right to conduct a business" was "'property' under the Hobbs Act" and "[a] loss to, or interference with the rights of, the victim is all that is required." *Id.* at 59a (internal quotations omitted).

B. This Court's Decision in *Scheidler II*

This Court reversed, holding that petitioners' actions did not constitute extortion within the meaning of the Hobbs Act because petitioners had not wrongfully "obtained" any "property" as required by 18 U.S.C. § 1951(b)(2). 537 U.S. at 402. The Court noted that the Hobbs Act drew its definition of extortion from the Penal Code of New York and the Field Code, a 19th-century model penal code. *Id.* at 403. Under New York law, "obtaining" property required both a deprivation and an acquisition of property. *Id.* at 403-04. The Court rejected the argument that "merely interfering with or depriving someone of property is sufficient to constitute extortion." *Id.* at 405.

A contrary holding, the Court emphasized, would impermissibly extend the Hobbs Act to the separate crime of coercion, which "involves the use of force or threat of force to re-

---

provide medical services free from wrongful threats, violence, coercion, and fear." App., *infra*, 182a. The relevant jury instructions, as well as the special verdict form, are reprinted at App., *infra*, 178a-195a.

strict another's freedom of action." 537 U.S. at 405. New York law had clearly established coercion as a separate and lesser offense from extortion, and the legislative history of the Hobbs Act showed that Congress "deci[ded] * * * to omit coercion" from the scope of the Hobbs Act. *Id.* at 406, 408. That decision – along with the rule of lenity – required reading the statute not to cover activity that would merely have constituted coercion. *Id.* at 409.[3]

The Court then rejected all of the other predicate acts that had served as the basis for the RICO violation and the nationwide injunction. The Court ruled that the state-law extortion counts were legally defective, as were the 46 violations and attempted violations of the Travel Act. 537 U.S. at 409-10. The Court concluded that "*all* of the predicate acts supporting the jury's finding of a RICO violation must be reversed," and that, therefore, the RICO "judgment * * * must also be reversed" and the injunction "must necessarily be vacated." *Id.* at 411 (emphasis added). With no legal basis for a RICO injunction, the Court stated that it "need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." *Ibid.*

C. The Seventh Circuit's Decision on Remand

1. One year after this Court's decision, the court of appeals on remand entered an unpublished order. App., *infra*, 25a-29a. The Seventh Circuit panel held that this Court's decision left undisturbed four predicate acts found by the jury – those involving "acts or threats of physical violence to any person or property" in purported violation of the Hobbs Act. In the panel's view, this Court could not "have found these four predicate acts insufficient to support the district court's injunction," because the

---

[3] The Court set forth the definition of coercion under New York law at 537 U.S. at 405 n.10. Coercion included the wrongful use of "violence" or "threat[s]" of violence against "any other person" or "his property," if such actions were undertaken "with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing." New York Penal Law § 530 (1909).

only question the Court accepted for review with respect to the Hobbs Act was "'whether petitioners committed extortion within the meaning of the Hobbs Act.'" App., *infra*, 28a (quoting 537 U.S. at 397).

The panel concluded that it was possible that the four supposedly surviving predicate acts might be "sufficient to support the nationwide injunction," and remanded that issue to the district court. App., *infra*, 28a. The panel did not explain how its remand instructions could be reconciled with this Court's statements that the injunction "must necessarily be vacated" and that the underlying RICO judgment "must also be reversed." 537 U.S. at 411. On remand, the panel noted, the district court "may need to determine whether the phrase 'commits or threatens physical violence to any person or property' constitutes an independent ground for violating the Hobbs Act or, rather relates back to the grounds of robbery or extortion." App., *infra*, 29a.

2. Petitioners sought panel and en banc rehearing, arguing, among other things, that the order on remand was squarely at odds with this Court's unambiguous mandate in *Scheidler II*, that this Court *did* resolve the legality of the four Hobbs Act predicates, and that, in the alternative, the panel should decide whether the Hobbs Act reaches freestanding acts or threats of violence to property or persons, unconnected to extortion or robbery (an issue that was briefed to the same panel in the prior appeal). But cf. App., *infra*, 6a (suggesting, incorrectly, that petitioners were seeking rehearing on the ground that the panel's remand order had "implicit[ly] resol[ved]" the Hobbs Act issue). No appellate court in the 58 years since the Hobbs Act was enacted, petitioners explained, has interpreted the statute as punishing freestanding acts or threats of violence to persons or property – and the Ninth Circuit has categorically rejected this reading as "fatally flawed" and utterly "without merit." *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (1999). Petitioners also requested en banc consideration of this issue, noting that, if the panel decided that the Hobbs Act punishes freestanding acts or threats of violence, that would

place it in direct conflict with the Ninth Circuit. Finally, petitioners sought en banc consideration of the panel's prior holding, in conflict with other circuits, that injunctive relief is available to private parties under RICO.

3. On January 28, 2005, panel and en banc rehearing were denied over three dissenting votes. App., *infra*, 1a-24a. The panel offered no further explanation concerning how its remand order could be reconciled with this Court's remand instructions in *Scheidler II*. The panel stated that it had "nothing to add on that point to what we have already written," except to reiterate that this Court could not have reached these four counts because "they were not included in the petitions for *certiorari*." App., *infra*, 7a. Instead, the new opinion primarily addressed "whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO." *Id.* at 7a-8a. Although the panel purported not to resolve that issue conclusively ("for reasons of judicial economy and restraint"), it nonetheless devoted ten full pages to addressing – and criticizing – many of the arguments made in the rehearing petition for why the Hobbs Act cannot and should not be read to punish freestanding acts or threats of violence. *Id.* at 6a-15a.

Among other things, the panel suggested that the language of the Hobbs Act is ambiguous (App., *infra*, 8a):

> Whoever in any way or degree [1] obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or [2] attempts or conspires so to do, or [3] commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section* shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). "[T]here are two possible interpretations" of the third clause, the panel stated, and "[t]he choice between [them] * * * is not obvious." App., *infra*, 8a. Rejecting petitioners' argument, the panel stated that, "[g]rammatically, the text can be read either way without undue

strain." *Ibid.* Later in its opinion, the panel went even further, suggesting that reading the third clause as punishing freestanding acts or threats of violence would be to "take it at face value." *Id.* at 15a.[4]

Next, the panel observed that "there is no decisional law that sheds light on which of the two readings is to be preferred." App., *infra*, 8a. Yet the panel then quoted a sentence from *Stirone* v. *United States*, 361 U.S. 212 (1960), which observed that the Hobbs Act "speaks in broad language, manifesting a purpose to *use all the constitutional power Congress has* to punish interference with interstate commerce by extortion, robbery *or physical violence*." *Id.* at 215 (emphasis added). According to the panel, the quoted sentence "suggests that the Court saw three distinct types of predicate acts in the statute." App., *infra*, 8a. The panel later acknowledged that "the Sixth and Ninth Circuits have both" squarely held that the Hobbs Act does *not* reach freestanding acts or threats of violence. App., *infra*, 11a (citing *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975), and *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999)). But the panel claimed a conflict between those decisions and the unpublished opinion in *United States* v. *Milton*, 1998 WL 468812 (4th Cir. Aug. 4, 1998).

Finally, the panel turned to the "legislative history." App., *infra*,15a. The panel acknowledged that the Hobbs Act, as enacted in 1946, "*explicitly linked* the 'acts of physical violence' clause to the prohibition on robbery and extortion." *Ibid.* (emphasis added). Indeed, the Hobbs Act as enacted could hardly have been clearer on this point:

> SEC 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or

---

[4] The panel also suggested that limiting criminal liability under the Hobbs Act to acts or threats of physical violence "in furtherance of a plan or purpose to do anything in violation of" Section 1951 would violate the "well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless." App., *infra*,14a. The panel brushed aside or ignored petitioners' contrary arguments.

> commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> SEC 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of section 2* shall be guilty of a felony.

Pub. L. No. 486, 60 Stat. 420 (1946) (emphasis added). According to the panel, however, when Congress in 1948 approved a general revision and codification of the entirety of Title 18, it may have altered the Hobbs Act by expanding it to cover freestanding acts or threats of violence. Although the panel acknowledged that the 1948 "revisions were intended to be formal, stylistic changes," it went on to suggest that "it is not beyond the realm of possibility that the revisers may have made certain substantive changes, either advertently or inadvertently." App., *infra*, 15a.

Despite its detailed discussion of the Hobbs Act's meaning, the panel insisted that "it would be imprudent to resolve this problem of statutory interpretation at this stage" (19 years into this litigation) and therefore – "for reasons of judicial economy and restraint" – it "prefer[red] a wait-and-see approach." App., *infra*, 6a-7a, 15a-16a. The panel also said it might be unnecessary for the district court to resolve the Hobbs Act issue. *Id.* at 7a-8a, 16a. "[O]nly if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury," the panel said, will that court "have to confront" the Hobbs Act question. *Id.* at 7a.

4. Judge Manion, joined by Judge Kanne, dissented from the denial of rehearing en banc. App., *infra*,17a-24a.[5] In the dissenters' view, the panel's decision "directly conflicts with the Supreme Court's opinion," "rests on an impermissible reading of the Hobbs Act, and unnecessarily revives a case that is already more than eighteen years old." App., *infra*,19a. The dissenters pointed out that the panel's conclusion that certain RICO predicates and the injunction might remain tenable was flatly inconsistent with *Scheidler II*'s unambiguous language and with this Court's conclusion that it need not address the availability of private RICO injunctions.

Moreover, even if "the panel's remand order could be labeled a reasonable interpretation of the Supreme Court's opinion, the four predicate acts of violence to persons or property cannot, as a matter of law, constitute a violation of the Hobbs Act." App., *infra*, 21a. "Clearly," the dissenters explained, "under the Hobbs Act, physical violence to any person or property is confined to furthering robbery or extortion. It does not stand alone as a separate violation." *Id.* at 23a-24a. This straightforward reading explains why this Court's conclusion that petitioners had not committed extortion within the meaning of the Hobbs Act ended the case: "the Supreme Court's holding that there was no extortion means that no Hobbs Act violation possibly exists." *Id.* at 24a. Finally, the dissenters faulted the panel for purporting not to decide the Hobbs Act issue while simultaneously criticizing petitioners' arguments. *Id.* at 23a.

REASONS FOR GRANTING THE PETITION

As this case returns to the Court, it presents three issues that satisfy the traditional criteria for this Court's review. First, the case involves a lower court's flagrant disregard of this Court's unambiguous mandate in *Scheidler II*. Second, it raises a significant question about the meaning of the Hobbs Act (an issue on which the Seventh Circuit's ruling is irreconcilable with

---

[5] Chief Judge Flaum also voted to grant rehearing en banc, but he did not join the dissenting opinion.

decisions of the Sixth and Ninth Circuits). Third, the panel's decision has resuscitated the important and recurring issue of the availability of private injunctive relief under RICO, a question on which this Court previously granted certiorari. Each of these issues provides an independent reason for a grant of certiorari, and the first two warrant summary reversal.

I. Certiorari Or Mandamus Is Warranted Because The Seventh Circuit's Decision Is Contrary To This Court's Clear Mandate

In reversing the Seventh Circuit's decision, this Court unambiguously stated (537 U.S. at 411 (emphasis added in part)):

> Because *all of the predicate acts* supporting the jury's finding of a RICO violation *must be reversed, the judgment that petitioners violated RICO must also be reversed.* Without an underlying RICO violation, the *injunction* issued by the District Court *must necessarily be vacated.* We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964.

In direct contradiction, the Seventh Circuit has now decided that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the injunction might *not* need to be vacated after all.

A. This extraordinary conclusion warrants review – and summary reversal – because, as the dissenting judges below observed it "directly conflicts" with this Court's instructions. App., *infra*, 19a (dissenting opinion); *id.* at 17a ("I believe that the Supreme Court meant what it said"). Neither can the panel's decision be reconciled with this Court's description of its holding: "We further *hold* that our determination with respect to extortion under the Hobbs Act *renders insufficient the other bases or predicate acts of racketeering* supporting the jury's conclusion that petitioners violated RICO." 537 U.S. at 397 (emphasis added). The Seventh Circuit also disregarded this

Court's decision *not* to address the question concerning the availability of private RICO injunctions on which review had been granted. That decision necessarily rested on a determination that the underlying RICO judgment was no longer valid.

The panel simply was not free to conclude that "the other bases or predicate acts" might be sufficient, after all, to support the injunction (which necessarily rested on the jury's invalidated "conclusion that [petitioners] violated RICO"). See App., *infra*, 17a-19a (dissenting opinion); *id.* at 20a (this Court's "unequivocal holding negates any reasonable inference that those four predicate acts remain an issue"). As this Court long ago explained, a court of appeals

> is bound by the [Supreme Court's] decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal * * * or by a writ of mandamus to execute the mandate of this court.

In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (citations omitted); see also *Baltimore & Ohio R.R.* v. *United States*, 279 U.S. 781, 784-85 (1929). Because the panel failed to follow this Court's mandate, summary reversal is warranted. See *id.* at 785 ("It is well understood that this court has power to do all that is necessary to give effect [to] its judgments.").[6]

---

[6] As *Sanford* and *Baltimore & Ohio R.R.* indicate, when an order issued by a lower court that takes the form of an appealable order fails to comply with this Court's mandate, "the aggrieved parties may file the ordinary petition for certiorari." R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 585 (8th ed. 2002). Because the present case was "in the court of appeals," it clearly falls within the Court's certiorari jurisdiction under 28 U.S.C. § 1254(1). See *Hohn* v.

As the dissenting judges correctly noted below, if there was any ambiguity in this Court's opinion (and there is none), the proper course for respondents would have been "to seek rehearing from the Supreme Court." App., *infra*, 21a (dissenting opinion). Cf. *Parks* v. *Simpson Timber Co.*, 389 U.S. 909 (1967); *Union Trust Co.* v. *Eastern Air Lines, Inc.*, 350 U.S. 962 (1956). This they failed to do – no doubt because they knew what the answer would be.

B. In any event, the reasons the panel gave for refusing to follow this Court's mandate do not withstand scrutiny. According to the panel, the *Scheidler II* "opinion did not address the legal implications of the remaining four acts of physical violence. Indeed, any reader will see that the Court had nothing at all to say about them, for the understandable reason that they were not included in the petitions for *certiorari*." App., *infra*, 7a. Citing this Court's Rule 14.1(a) and its "general refusal to decide issues outside the question presented," the panel declared itself unwilling to "presume that in this case [the Court] went beyond the scope of its grant of certiorari * * * to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction." App., *infra*, 28a.

That reasoning is flawed at every turn. To begin with, as just explained, there is nothing "*sub silentio*" about this Court's

---

United States, 524 U.S. 236, 241-42 (1998). There is thus no jurisdictional impediment to bringing the Seventh Circuit into compliance with the mandate of *Scheidler II* by granting certiorari and reversing the court of appeals' judgment. See *Perkins* v. *Fourniquet*, 55 U.S. 328, 330 (1852). In an abundance of caution, however, petitioners also request (in the alternative) that the Court, if necessary, construe this petition as one for a writ of mandamus under 28 U.S.C. § 1651. See *United States* v. *Fossatt*, 62 U.S. 445, 446 (1858) ("And if the court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time, bring the errors or omissions of the inferior court before this court for correction."); STERN ET AL., SUPREME COURT PRACTICE, *supra*, at 585 ("One function of the writ of mandamus is to force a lower court to comply with the mandate of an appellate court.").

opinion or the instructions and holding quoted above. To the contrary, the Court was quite explicit in invalidating *all* of the predicate acts, as well as the RICO judgment and the injunction. There is no ambiguity in this Court's statement that "all" – not "some" or "most" – of the RICO predicates had to be reversed. 537 U.S. at 411. And there is neither need nor reason to "presume" that this Court did not mean exactly what it said.

Equally mistaken was the panel's suggestion that the four acts of violence were *not* included in the petitions for certiorari. On the contrary, both of the petitions for certiorari expressly referred to the four predicate acts involving "acts or threats of physical violence to any person or property in violation of the Hobbs Act." 01-1118 Pet. 5 n.3; see also 01-1119 Pet. 3-4 & nn.3-5. Indeed, the significance and status of these four predicate acts were debated by the parties at the petition stage, with respondents arguing that this Court should deny review of the Hobbs Act question because the jury found "4 violations of the Hobbs Act through acts or threats of physical violence," those predicate acts were "unchallenged" in the Supreme Court, and the case therefore was "an inappropriate vehicle for determining whether the Seventh Circuit's construction of the Hobbs Act was correct." 01-1118 and 01-1119 Br. in Opp. 5, 15. In response, petitioners argued, among other things, that "*all* of the other predicate acts found by the jury" required "a showing of either 'robbery' (not alleged here) or 'extortion,'" because the Hobbs Act by its plain terms criminalizes acts or threats of violence *only* if they are committed "in furtherance of a plan or purpose" to violate Section 1951. 01-1118 Cert. Reply Br. 7-8 & n.11 (emphasis added) (citing *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (9th Cir. 1999)); accord 01-1119 Cert. Reply Br. 7 & n.13. Moreover, the Seventh Circuit's overbroad definition of "property" – which petitioners cited as a principal reason for granting review of the Hobbs Act issue (01-1118 Pet. 17-19) – applied with equal force to the four predicates involving acts or threats of violence against "property" or persons. Thus, petitioners took the position that these four

predicate acts *were* "fairly included" (S. Ct. Rule 14.1(a)) within the Hobbs Act question presented.

This Court granted review of the Hobbs Act question over respondents' objections, see 535 U.S. 1016 (2002). At the merits stage, respondents shifted gears and made a strategic decision to *ignore* these four Hobbs Act predicates. Thus, although respondents included a detailed argument that the RICO judgment was valid and should be upheld "even apart from the Hobbs Act predicates," they pointedly did *not* argue that the judgment could stand because the jury found four Hobbs Act violations not involving extortion. 01-1118 and 01-1119 Resp. Merits Br. 33-35; App., *infra*, 21a (dissent). Indeed, respondents went further in order to address the jury's failure to specify which two or more of the 121 predicate acts constituted the requisite "pattern" of racketeering activity. Faced with that problem, respondents argued that the RICO judgment could stand "even apart from the Hobbs Act predicates" because "*all* of the acts that supported the jury's finding as to Hobbs Act violations *also* supported its findings as to state law [extortion] violations" (so that "the jury unquestionably would have found a pattern if only state extortion were at issue"). 01-1118 and 01-1119 Resp. Merits Br. 35. That argument, of course, *presupposed* that the four acts or threats of violence *were in fact related to extortion.*

Respondents' strategy helps explain why the Court in *Scheidler II* saw no need to state expressly that its resolution of the extortion issue also rendered the four violence counts legally insufficient. The Court quite properly would have assumed that the issue was simply no longer in dispute. See App., *infra*, 21a (dissent) (because respondents at merits stage "did not argue that the four predicate acts of violence * * * independently justified the jury's verdict, * * * the Supreme Court found no need to expressly address that question").

Moreover, even if the Hobbs Act question cannot be read as "fairly including" the four predicates at issue, the panel was wrong to rest on a presumption that this Court did not go

"beyond the scope of its grant of certiorari." App., *infra*, 28a. It is *undeniable* that this Court *did* go beyond the scope of its grant of certiorari in *Scheidler II* – by resolving the legality of the state-law extortion counts. Notably, the validity of the state-law extortion counts was raised as a *separate* issue in Operation Rescue's petition for certiorari, but the Court did not grant that issue. See 01-1119 Cert. Pet. i; 535 U.S. 1016 (2002) (order limiting grant of certiorari). The Court nonetheless reached and resolved that issue, holding that the state-law extortion counts were legally defective.

Nor is this surprising. As the panel acknowledged (App., *infra*, 28a), this Court's usual practice of deciding only the issues presented and those issues "fairly included" therein (S. Ct. Rule 14.1(a)) is not a "jurisdictional or absolute" limit on the Court's authority but rather a rule of discretion. See R. STERN ET AL., *supra*, at 422. Beyond that, it is well settled that the Court "may consider additional questions" *not* presented in the petition "if necessary to *properly dispose* of the case." *Id.* at 416 (internal quotations omitted) (emphasis added); see, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 n.12 (1981). Thus, the Court was perfectly free to decide that it should address the state-law extortion counts, even though they were outside the scope of the questions presented, because doing so would allow this Court properly to dispose of the RICO injunction issue by avoiding a decision on it. The Seventh Circuit should have conformed to what this Court *did*, not operated on presumptions about what this Court did *not* do.

II. The Court Should Decide Whether The Hobbs Act Punishes Acts Or Threats Of Violence To Property Or Persons, Unconnected To Either Extortion Or Robbery

In response to the rehearing petition, the panel has issued a published decision that strongly suggests, in direct conflict with decisions of the Sixth and Ninth Circuits, that the Hobbs Act makes it a felony punishable by up to 20 years in federal prison for any person to threaten (or commit) physical violence against any "property" (or "person") in a manner that "in any

way or degree * * * affects commerce" – even if such threats or acts of violence are wholly unconnected with robbery or extortion. Although the panel insisted that it was not actually resolving what it acknowledged is an "important question" of federal criminal law (App., *infra*, 6a), it proceeded to criticize virtually all the arguments advanced against this sweeping interpretation. The panel achieved the worst of all worlds by prejudging the outcome on remand yet prolonging already-protracted litigation by pretending to leave the district court with the first take on the issue.

Worse yet, the effect of the panel's analysis is to give credence to a far-reaching theory of liability broader in certain respects than even the expansive definition previously adopted by the same panel, which this Court rejected as "well beyond" the "outer boundaries" of Hobbs Act liability. *Scheidler II*, 537 U.S. at 402. The panel's decision creates conflicts with decisions of this Court and other courts of appeals, addresses an important and recurring issue, and is wrong.

A. *The Conflicts*. According to the panel, the circuits are in conflict over whether the Hobbs Act reaches freestanding acts or threats of violence against property or people, unconnected to either robbery or extortion. App., *infra*, 11a-12a. And it is true that both the Sixth and Ninth Circuit have rejected that interpretation as inconsistent with plain language of the Hobbs Act. See *id.* at 11a (citing *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975), and *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999)). On the other hand, the panel suggested that the Fourth Circuit reached the opposite result in *United States* v. *Milton*, 1998 WL 468812 (Aug. 4, 1998). App., *infra*, 12a; but see pages 24-25, *infra*. The panel expressed basic agreement with the supposed position of the Fourth Circuit, stating that the Sixth and Ninth Circuit approach "threatens to leave * * * an entire clause in the statute" with "no meaningful function to perform" (App., *infra*, 15a) and the Fourth Circuit's supposed reading takes the statutory text "at face value" and is "the result

one reaches looking at the statute as whole." *Id.* at 14a-15. Thus, the panel either created or exacerbated a circuit conflict.[7]

The panel's opinion is also at odds, in at least three respects, with this Court's decisions. *First*, it conflicts with *United States* v. *Enmons*, 410 U.S. 396 (1973), which reversed the Hobbs Act convictions of labor union officials and members who had engaged in acts of violence and destruction of property during a campaign to induce an employer to agree to a union contract. Although the defendants had fired high-power rifles at the employer's facility, and even blown up a company transformer, this Court ruled that they had *not* violated the Hobbs Act. The Court reasoned that there was no "obtaining of property of another" through "wrongful" means (18 U.S.C. § 1951(b)(2)) – part of the definition of "extortion" – because the defendants had acted to further "legitimate union objectives, such as higher wages in return for genuine services." 410 U.S. at 400.

If the Seventh Circuit is correct, however, then the conduct in *Enmons* violated the Hobbs Act after all. If the "physical violence" clause of the Hobbs Act is freestanding, and need not

---

[7] The Hobbs Act question in this case also presents the Court with an opportunity to resolve other conflicts in the lower courts – specifically, conflicts over the meaning of "property" under the Hobbs Act. In *Scheidler II*, this Court, having concluded that there was no "obtaining" (or attempted obtaining), observed that there was no need to delineate precisely the "outer boundaries of extortion liability under the Hobbs Act." 537 U.S. at 402. In particular, the Court explained, it was unnecessary to address whether the term "property" in the Hobbs Act includes the three components mentioned in the jury instructions. See note 2, *supra*. But that avoided issue is clearly present in this case, and necessarily underlies any holding that freestanding acts or threats of violence to "property" are indeed covered. As we explained in our previous petition, the Seventh Circuit's definition of "property" for purposes of the Hobbs Act conflicts with the position taken by other circuits. See 01-1118 Pet. 17-20. Compare *Town of West Hartford* v. *Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990) and *Libertad* v. *Welch*, 53 F.3d 428, 436-37 (1st Cir. 1995) with App., *infra*, 59a (citing *United States* v. *Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)).

have any connection to extortion or robbery, then it would not include "wrongful" "obtaining" as an element and the Hobbs Act would apply with full force to acts or threats of violence occurring during labor protests. Nor can there be any doubt that the acts of physical violence that were proven in *Enmons* "in any way or degree * * * affect[ed] commerce" (18 U.S.C. § 1951(a)). Thus, if the panel is correct, then the convictions in *Enmons* should have been sustained. Yet this Court, in *Enmons*, noted that in "nearly three decades that have passed since the enactment of the Hobbs Act, no reported case" had upheld the use of the Hobbs Act against violence occurring on the picket line – even though during this period "the Nation has witnessed countless economic strikes, often unfortunately punctuated by violence." 410 U.S. at 408-10. And this Court categorically rejected the government's "broad" reading of the Hobbs Act as punishing "[t]he worker who threw a punch on a picket line" by "20 years' imprisonment and a $10,000 fine" as contrary to the rule of lenity and "an unprecedented incursion into the criminal jurisdiction of the States." *Id.* at 410. So, too, here.

Second, the panel's decision is inconsistent with the logic of *Scheidler II*. As the panel acknowledged, the holding of *Scheidler II* rested on a determination that "Congress used the Penal Code of New York as a model for the [Hobbs] Act" and made a deliberate "decision to include extortion as a violation of the Hobbs Act *and omit coercion*." App., *infra*, 9a (emphasis added). See 537 U.S. at 403, 405-06; *id.* at 409 (distinction between coercion and extortion "controls these cases"). Moreover, as the panel also acknowledged (App., *infra*, 9a, 10a), the crime of coercion under New York law included acts or threats of "violence" against "other person[s]" or "property," unconnected to either extortion or robbery. See note 3, *supra*. It follows that freestanding acts or threats of violence – which constitute coercion under New York law – *cannot* be covered by the Hobbs Act without "eliminat[ing] the recognized distinction between extortion and the separate crime of coercion" and violating Congress's intent. 537 U.S. at 405-08. Thus, the panel was wrong to say that this Court's reasoning concerning

Congress's exclusion of coercion "offers at best a subtle indication, and at worst is not helpful at all." App., *infra*, 9a. In fact, *Scheidler II*'s reasoning is dispositive.

There are other inconsistencies with *Scheidler II* as well. The panel's statement that a single sentence in *Stirone* v. *United States*, 361 U.S. 212 (1960), which involved a prosecution for extortion, "suggests that the Court saw three distinct types of predicate acts in the statute" (App., *infra*, 9a) ignores this Court's clarification, in *Scheidler II*, that the sentence in question did *not* adopt a broad interpretation of the substantive provisions of the Hobbs Act but rather related only to the commerce clause element. See 537 U.S. at 408; but see *id.* at 417 (Stevens, J., dissenting). Even before *Scheidler II*, the Ninth Circuit had correctly rejected the panel's reading of this sentence in *Stirone*. *Yankowski*, 184 F.3d at 1074 ("The government's contention that this single statement * * *, taken out of context, should be used * * * to reject the clear and express provisions of the Hobbs Act is without merit.").

Inexplicably, the panel also ignored this Court's teaching, in *Scheidler II*, that the rule of lenity informs the interpretation of the substantive terms of the Hobbs Act. 537 U.S. at 408-09. The panel mistakenly suggested that the rule of lenity applies only if one of the two interpretations threatened to federalize traditional state crimes. App., *infra*, 12a (incorrectly stating that our "rule of lenity * * * argument is premised on the doomsday scenario they foresee if the Act is read to permit three independent predicate acts"). In fact, the rule of lenity requires courts to choose the narrower of two reasonable interpretations, even if neither reading threatens to federalize traditional state crimes. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 148-49 (1994).

As if that were not enough, the panel's decision is difficult to square with the reasons given by Justices Ginsburg and Breyer for concurring in *Scheidler II*. See 537 U.S. at 411-12 (concurring opinion). As Justice Ginsburg explained, the Court was "rightly reluctant" to "extend * * * further" the "domain" of RICO – a statute that "imposes severe criminal penalties and

hefty civil liability" and that "has already 'evolv[ed] into something quite different from the original conception of its enactors'" – "by endorsing the expansive definition of 'extortion' adopted by the Seventh Circuit." *Ibid.* (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 500 (1985)). Yet the panel's endorsement of the "freestanding" reading accomplishes the same undesirable expansion of RICO.

Third, the panel's treatment of "the 1948 revision and codification of Title 18 of the U.S. Code" – which adopted the current language of Section 1951 – is contrary to a long line of this Court's decisions. App., *infra*, 15a. According to the panel, although "these revisions were intended to be formal, stylistic changes," Congress "may have made certain substantive changes, either advertently *or inadvertently*." *Ibid.* (emphasis added). But this Court has long recognized the principle that it "will *not* be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention *be clearly expressed*." *United States* v. *Ryder*, 110 U.S. 729, 740 (1884) (emphasis added). And this Court has repeatedly applied that principle to the 1948 revisions themselves. See, *e.g.*, *Muniz* v. *Hoffman*, 422 U.S. 454, 468-70 (1975); *United States* v. *Cook*, 384 U.S. 257, 260 (1966). This Court's decisions thus establish that no substantive change in the law was brought about by the 1948 revisions – unless the detailed Reviser's Notes clearly indicate that "a substantive change in the law was contemplated." *Muniz*, 422 U.S. at 474. And, contrary to the panel's suggestion, this Court's cases do not allow any assumption that Congress made substantive changes "inadvertently." App., *infra*, 15a. Finally, the Reviser's Notes, which are reprinted in the U.S. Code Annotated, show that the changes to Section 1951 were not intended to be substantive at all. See 18 U.S.C. App. (Revisers' Notes), at 2591-92 (1948).[8]

---

[8] The settled principles governing the construction of changes in language made by the 1948 revisions were clearly set forth in an article cited by the panel's own opinion (at App., *infra*, 15a). See Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439, 441 (1948-1949) ("There

B. *The Issue Is Important and Recurring*. "Over the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction * * *." *Evans* v. *United States*, 504 U.S. 255, 290 (1992) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). Although several federal statutes criminalize extortion, "[p]rosecutors prefer" the Hobbs Act because "it carries a twenty year maximum sentence." Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 816 (1988). The Hobbs Act is also commonly invoked as a predicate act of racketeering in criminal prosecutions and private civil actions brought under RICO.

Because the Hobbs Act is so often used, an expansion of its scope has wide-ranging implications. In the past decade, RICO has repeatedly been used against abortion protesters, with mixed success. See, *e.g.*, *Palmetto State Med. Ctr., Inc.* v. *Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997); *Feminist Women's Health Ctr.* v. *Codispoti*, 63 F.3d 863 (9th Cir. 1995); *Libertad* v. *Welch*, 53 F.3d 428 (1st Cir. 1995). There is no reason why, if the Seventh Circuit's latest interpretation of the Hobbs Act is correct, RICO actions based on predicate Hobbs Act offenses could not also be pursued against social protesters of all stripes, including those demonstrating for civil rights, environmental causes, or animal rights. It could also be applied to labor protests if acts or threats of violence (against persons *or* property) occur.[9]

---

was no purpose on the part of the Revision staff to effect any change in existing law."); *id.* at 445-48 (discussing special rules governing judicial construction of 1948 Act).

[9] Contrary to the panel's suggestion, the practical impact of its far-reaching construction of the Hobbs Act is not mitigated because of Congress's inclusion of a jurisdictional element that "limits" the Hobbs Act's applicability to acts or threats of violence that "*in any way or degree* * * * affect[] commerce" (18 U.S.C. § 1951(a) (emphasis added)). App., *infra*, 12a (omitting italicized language). As explained above, a restrictive construction of the jurisdictional element of the Hobbs Act is inconsistent with this Court's teachings in both *Stirone* and *Scheidler II*.

C. *The Panel's Decision Is Wrong.* Any suggestion that the Hobbs Act punishes freestanding acts or threats of violence against property or persons is mistaken. By its plain terms, Section 1951 makes it a crime to "commit[] or threaten[] physical violence to any person or property" *only* if such acts or threats are committed "in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. § 1951(a). In other words, acts or threats of violence are proscribed by the Hobbs Act only if done in furtherance of a plan to commit (or attempt to commit) robbery or extortion.

Any doubt about the text's plain meaning is eliminated if one looks at the text of the Hobbs Act as enacted in 1946. See pages 9-10, *supra*. As even the panel was constrained to admit (App., *infra*, 15a), the text of the 1946 Act "explicitly" and unambiguously requires a connection between the forbidden acts or threats of violence and either robbery or extortion. As explained above, the panel was wrong to impute to the drafters of the 1948 revision an intent to make a substantive change.

The panel made other serious missteps on the merits. Contrary to the panel's suggestion (App., *infra*, 12a), the Fourth Circuit, in *United States* v. *Milton*, 1998 WL 468812 (Aug. 4, 1998), did *not* interpret the Hobbs Act as reaching freestanding acts or threats of violence. *Milton* involved a Hobbs Act conviction based on "a violent robbery." *Id.* at *1. Accordingly, the Fourth Circuit had no occasion to address the "freestanding" theory. Moreover, the only issue raised on appeal in *Milton* was whether the government had presented sufficient evidence that the defendant's robbery affected interstate commerce.[10]

See also 18 U.S.C. § 1951(b)(3) (defining "commerce" broadly).

[10] Contrary to the panel's suggestion (App., *infra*, 12a), it is not possible fairly to interpret as an endorsement of the "freestanding" theory the *Milton* court's passing statement (in dictum) that "[t]here are two essential elements" of a Hobbs Act conviction: interference with interstate commerce, and a crime of robbery, extortion or violence. See *United States* v. *Bailey*, 990 F.2d 119, 125 (4th Cir.1993) (quoting *Stirone* v. *United States*, 361 U.S. 212, 218, 80 S. Ct. 270, 4 L. Ed.2d 252

Equally flawed was the panel's speculation that the snippet of language torn from *Milton* "likely * * * was expressing agreement with the position of the government, though * * * it is impossible to know." App., *infra*, 12a. In fact, the United States' brief in *Milton* in no way mentioned or endorsed the "freestanding" theory. See Br. of Appellee, *United States* v. *Milton*, No. 96-4851 (4th Cir. filed Aug. 19, 1992) (addressing issues of robbery's jurisdictional nexus to interstate commerce and sentencing disparity). That should come as no surprise, because the Hobbs Act conviction in that case involved a robbery.

Nor was the panel correct in stating that "[i]t appears to us that the United States may still be taking that position with respect to the scope of the Hobbs Act for purposes of criminal prosecutions, though we cannot be sure without requesting the views of the Solicitor General." App., *infra*, 12a. The Justice Department has *rejected* the "freestanding" reading:

> The statutory prohibition of "physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section" *is confined to violence for the purpose of committing robbery or extortion.*

U.S. DEPT. OF JUSTICE, CRIMINAL RESOURCE MANUAL § 2402 (1997) (emphasis added) (citing *United States* v. *Franks*, 511 F.2d 25, 31 (6th Cir. 1975)) <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02402.htm>.

The panel was also wrong to suggest that limiting criminal liability under the Hobbs Act to acts or threats of physical violence "in furtherance of a plan or purpose to do anything in violation of" Section 1951 (18 U.S.C. § 1951(a)) would violate the "well-worn canon of statutory interpretation under which a

---

(1960))." *Milton*, 1998 WL 468812, at *1. What *Bailey* actually says is that the "two essential elements of the Hobbs Act crime" that were identified in *Stirone* were "interference with commerce, *and extortion*." *Bailey*, 990 F.2d at 125 (emphasis added) (quoting *Stirone*, 361 U.S. at 218). The *Milton* panel's inaccurate paraphrase in an unpublished opinion hardly counts as endorsement of the "freestanding" theory.

court should avoid making one part of statute meaningless." App., *infra*,14a. That analysis is soundly refuted by the language of the 1946 Act, which (as even the panel conceded) required that acts or threats of violence be connected to either robbery or extortion. See pages 9-10, *supra*.

For all of these reasons (and still others more suitable for a merits brief than a petition), and because of its inconsistency with *Scheidler II*, *Enmons*, and this Court's cases interpreting the 1948 revisions to Title 18, the panel's decision is wrong.[11]

III. This Court Should Grant Review Again To Resolve The Circuit Split Over Whether Injunctive Relief Is Available In A Private RICO Action

Almost three years ago, this Court in *Scheidler II* granted certiorari to decide the following question: "Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO], 18 U.S.C. § 1964(c)." 01-1118 Pet. i. In reversing on the merits, this Court concluded that it "need not address" this question "[b]ecause all of the predicate acts supporting the jury's finding of a RICO violation" and the liability judgment itself "must be reversed" and the injunction "vacated." 537 U.S. at 411.

---

[11] The panel's heavy reliance (App., *infra*, 8a, 13a) on Bradley, *NOW v. Scheidler: RICO Meets The First Amendment*, 1994 SUP. CT. REV. 129 (1994), was misplaced. That article antedates this Court's decision in *Scheidler II*, which establishes that Congress did not intend to punish conduct that would qualify as coercion under New York law. It also suffers from multiple flaws, including: (1) its failure to analyze the language of the Hobbs Act as enacted, which refutes the "freestanding" reading and disproves the article's argument about Congress's intent; (2) its failure to address (much less explain) how the "freestanding" reading can be reconciled with *Enmons*; and (3) its reliance on a passage from a 1945 House Report that referred to a *different* title from what would become the Hobbs Act in a larger, omnibus bill – a title that was never enacted. See Bradley, 1994 SUP. CT. REV. at 143 n.78.

Under the opinion on remand, the issue remains alive after all. And the conflict in the circuits has persisted and spawned additional confusion in the lower courts. See, *e.g.*, *In re Managed Care Litigation*, 298 F. Supp. 2d 1259, 1282-83 (S.D. Fla. 2003); *Motorola Credit Corp.* v. *Uzan*, 202 F. Supp. 2d 239, 243-44 (S.D.N.Y. 2002), remanded, 322 F.3d 130 (2d Cir. 2003). As we explained in our prior petition for a writ of certiorari, the issue is both important and recurring. Moreover, the Seventh Circuit's decision is manifestly incorrect (a conclusion endorsed by the Solicitor General's merits brief in *Scheidler II*).

A. As we demonstrated in our previous petition for a writ of certiorari (01-1118 Pet. 6-10), the Seventh Circuit's earlier opinion squarely conflicts with the Ninth Circuit's decision in *Religious Technology Ctr.* v. *Wollersheim*, 796 F.2d 1076 (1986), cert. denied, 479 U.S. 1103 (1987). Although respondents, in unsuccessfully opposing certiorari, argued that there was no circuit split because *Wollersheim* involved a preliminary injunction (Opp. 7), we explained that this argument was wrong, refuted by the Ninth Circuit's analysis and by subsequent Ninth Circuit cases, inconsistent with the Seventh Circuit's own analysis, and contrary to representations made by respondents' counsel during oral argument in the Seventh Circuit. See 01-1118 Pet. 6-10; 01-1118 Pet. Reply Br. 2-3 & n.5.

B. In becoming the first federal appellate court to uphold the availability of injunctive relief in this setting, the Seventh Circuit in 2001 suggested in multiple ways that the intercircuit conflict it was creating should not raise concerns because judicial opinion about the availability of injunctive relief was divided, and because *Wollersheim* reflected an outmoded method of statutory interpretation, rested on errors, or had been superseded by later decisions of this Court. These efforts to mask the extent of the panel's radical departure from settled law are worth highlighting because of their striking similarity to the panel's most recent decision. In both instances, the panel went to great lengths to reach a particular outcome and characterize it as

supported by the decisions of other circuits and of this Court when in fact exactly the opposite was true.

First, the panel's prior opinion sought to disguise the extent of its departure from settled law by suggesting that "other courts of appeals * * * have addressed the point in *dicta* [and] are split." App., *infra*, 35a. In fact, every other circuit that had discussed the issue of injunctive relief for private parties had agreed with the Ninth Circuit. Contrary to the panel's suggestion (*ibid.*), the Eighth Circuit in *Bennett* v. *Berg*, 710 F.2d 1361, 1364 n.5 (en banc), cert. denied, 464 U.S. 1008 (1983), did not endorse the availability of private injunctions but rather expressly reserved the issue. Neither did the First Circuit reach the issue in *Lincoln House, Inc.* v. *Dupre*, 903 F.2d 845, 848 (1990). In similar fashion, as explained above, the panel's most recent opinion incorrectly suggests that (1) the Fourth Circuit has interpreted the Hobbs Act as punishing freestanding acts or threats of violence, and (2) the United States government may still be pressing that interpretation today. The panel's previous holding concerning the availability of injunctive relief in private RICO actions – like the reading of the Hobbs Act it now suggests is the most plausible – is, in fact, wholly unprecedented in the appellate courts.

Second, the panel was wrong in 2001 to suggest that *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), undermines "any rationale * * * that the courts of appeals may have followed in earlier years." App., *infra*, 38a. That case has no relevance to *Wollersheim* – which may explain why respondents never cited *Steel Co.* in their briefs in the court of appeals or in this Court (and made no effort to defend the panel's reliance on it at either the petition or merits stages).[12]

---

[12] *Steel Co.* involved the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(a)(1), which authorizes civil penalties and injunctive relief. The statute also contains a provision stating that district courts "shall have jurisdiction in actions brought under subsection [11046(a)]." 42 U.S.C. § 11046(c). In *Steel Co.*, this Court rejected the argument that, because Section

Third, the panel wrongly suggested that "Supreme Court decisions since the 1986 *Wollersheim* opinion" demonstrate that "the approach of the Ninth Circuit" – and in particular its reliance on legislative history – "no longer conforms to the Court's present jurisprudence." App., *infra*, 35a. In fact, the Ninth Circuit's decision rested principally on the *text and structure* of RICO – as well as on the crucial fact, brushed aside by the panel (*id.* at 42a), that Congress modeled Section 1964(c) on virtually identical provisions in the Sherman and Clayton Acts (provisions that, at the time RICO was enacted, had been authoritatively interpreted by this Court as *not* authorizing injunctive relief). See 796 F.2d at 1081-84, 1087. Moreover, the predecessor provision in the Clayton Act coexists with a separate provision in that statute that expressly authorizes private injunctive relief (a provision that has no equivalent in RICO and that was proposed, but rejected, as a RICO amendment).[13]

Just as the panel's earlier opinion seeks to brush aside this powerful evidence of RICO's meaning by labeling it "legislative history," the panel's most recent opinion refers to the *language of the Hobbs Act as enacted* as "legislative history" evidence. App., *infra*, 15a. It does so by treating the 1948 recodification of the whole of Title 18 as the crucial statute, even while acknowledging that the 1948 "revisions were intended to be formal, stylistic changes." App., *infra*, 15a. The panel then speculated that "it is not beyond the realm of possibility that the revisers

---

11046(c) refers to "jurisdiction," it follows that "all of the elements of a cause of action under" Section 11046(a)(1) implicate the court's subject-matter jurisdiction. 523 U.S. at 90.

[13] Contrary to the panel's suggestion, this Court often has looked to legislative history for guidance in interpreting RICO. See, *e.g.*, *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 164 (2001); *Rotella* v. *Wood*, 528 U.S. 549, 557 (2000); *Holmes* v. *SIPC*, 503 U.S. 258, 267 (1992). Indeed, the Court has "repeatedly" relied on the fact that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." *Holmes*, 503 U.S. at 267 (case citations omitted); *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 150-51 (1987).

may have made certain substantive changes, either advertently or inadvertently." *Ibid.* As explained above, that analysis is contrary to a long line of this Court's decisions and it ignores Congress's clear intent that the 1948 recodification *not* result in any substantive changes unless the Revisers' Notes say so specifically (which they not do for the Hobbs Act). And nothing in this Court's decision in *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 125 S. Ct. 460 (2004) (see App., *infra*, 8a-9a, 14a-15a), remotely supports such an approach to statutory interpretation.

C. The possibility that the district court, on remand, will elect not to uphold the injunction (in the original or modified form) is not a good reason to deny review of this issue. In light of this Court's decision in *Scheidler II*, petitioners should not be required to litigate that issue (in the district court and perhaps in yet another appeal to the Seventh Circuit) in this 19-year-old litigation. Moreover, the issue has already been fully briefed and argued in this Court, and the Court presumably would not have avoided its resolution if it had thought there was a possibility that an injunction could remain intact on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
1880 S. Redwood Street
Escondido, CA 92025
(760) 737-7181

ALAN UNTEREINER*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
BRIAN WILLEN
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

MARCH 2005

APPENDICES

APPENDIX A

United States Court of Appeals,
Seventh Circuit.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Plaintiffs-Appellees,
v.
Joseph M. SCHEIDLER, et al., Defendants-Appellants.

No. 99-3076, 99-3336, 99-3891, 99-3892, 01-2050.

Jan. 28, 2005.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division. No. 86 C 7888 – David H. Coar, Judge.

On Petitions for Rehearing and Rehearing En Banc.*

Before ROVNER, WOOD and EVANS, *Circuit Judges*.

WOOD, *Circuit Judge*. On February 26, 2004, this court issued an order responding to the remand of this case from the Supreme Court of the United States. See *Nat'l Org. for Women, Inc.* v. *Scheidler*, 2004 WL 375995 (7th Cir. Feb. 26, 2004), on remand from *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 397 (2003) (*NOW II*). In that order, we acknowledged the issues that were resolved by the Supreme Court, and we identified one question that remains in the case. The defendants

---

* After a vote, a majority of the judges in regular active service did not wish to hear this case *en banc*. Chief Judge Flaum, Judge Manion and Judge Kanne voted to grant rehearing *en banc*. Judge Ripple took no part in consideration or decision of this case.

then filed petitions for rehearing and rehearing *en banc* from that order. This opinion responds to those petitions.

I

For the convenience of all, we begin by reproducing the relevant text of the unpublished order that we issued on that date:

> In 1986, the National Organization for Women (NOW) and two health clinics that perform abortions ("plaintiffs") filed this class action alleging that defendants, a coalition of antiabortion groups called the Pro-Life Action Network (PLAN), Joseph Scheidler, and other individuals and organizations that oppose abortion, engaged in conduct amounting to a pattern of extortion in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). A more detailed account of the facts and the lengthy procedural history of this litigation is provided in the Supreme Court's first opinion in this case, *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*NOW I*), and in our prior decisions, *National Organization for Women, Inc.* v. *Scheidler*, 267 F.3d 687 (7th Cir. 2001), and *National Organization for Women, Inc.* v. *Scheidler*, 986 F.2d 612 (7th Cir. 1992).
>
> After the Supreme Court in *NOW I* remanded the case, the district court conducted a seven-week trial, at which the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. In response to special interrogatories, the jury found that the defendants or others associated with PLAN committed 21 violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 18 U.S.C. § 1952, 23 instances of attempting to violate the Travel Act, and four "acts or

threats of physical violence to any person or property." On this basis, the jury awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants appealed a number of issues relating to the conduct of the trial and the issuance of the injunction. We affirmed the district court's judgment in all respects. *Scheidler*, 267 F.3d at 693.

The defendants then filed a petition for a writ of certiorari with the United States Supreme Court, which the Court granted with respect to two of the three questions presented by the petition. *Scheidler* v. *Nat'l Org. for Women, Inc.*, 535 U.S. 1016 (2002). The Court limited its grant of certiorari to the following questions:

> 1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO].
>
> 2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" [–] and which defines "extortion" as "the obtaining of property from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear" – criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

Pet. for Writ of Cert., 2002 WL 32134867 (U.S. Jan. 28, 2002) (No. 01-1118) (internal citation omitted). In its opinion, the Court explained that it granted certiorari to

determine "whether petitioners committed extortion within the meaning of the Hobbs Act" and "whether respondents, as private litigants, may obtain injunctive relief in a civil action" under RICO. *NOW II*, 537 U.S. at 397. The Court held that "petitioners did not commit extortion because they did not 'obtain' property from respondents as required by the Hobbs Act," and this determination "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Id.* It therefore "reverse[d] without reaching the question of the availability of private injunctive relief under § 1964(c) of RICO," *id.*, and held that "[w]ithout an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated," *id.* at 411.

On remand to this court, the parties submitted Statements of Position pursuant to Circuit Rule 54. Plaintiffs argue that, although the Court in *NOW II* disposed of the 117 extortion-based predicate acts under RICO, the defendants did not petition for a writ of certiorari on the four predicate acts involving "acts or threats of physical violence to any person or "property" and, accordingly, the Court did not decide whether these acts alone could support the district court's injunction. In response, defendants contend that the Hobbs Act does not outlaw "physical violence" apart from extortion and robbery, and therefore the Supreme Court's holding that the defendants did not commit extortion precludes a finding that the four acts or threats of violence might independently support the injunction. We remand to the district court to address this issue – which never before in this litigation has been the subject of full briefing or judicial consideration – in the first instance.

Although "[a]n order limiting the grant of certiorari does not operate as a jurisdictional bar," *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 (1981), the Supreme Court has consistently adhered to its Rule 14.1(a), which provides that "[o]nly the questions set out in the petition, or fairly

included therein, will be considered by the Court." See *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184 (2002); *Glover* v. *U.S.*, 531 U.S. 198, 205 (2001). Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari, see, *e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 244 n. 6 (2001); *West* v. *Gibson*, 527 U.S. 212, 233 (1999); *Nynex Corp.* v. *Discon, Inc.*, 525 U.S. 128, 140 (1998), we will not presume that in this case it went beyond the scope of its grant of certiorari, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction. We note that the Courts' opinion in *NOW II* makes no mention of these four predicate acts, and the parties' briefs before the Court reference these acts only in passing in footnotes. To conclude that the Court found these four predicate acts insufficient to support the district court's injunction would therefore require that we find both that the Court went beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion. We decline to draw such a conclusion.

Instead, we remand to the district court to determine whether the four predicate acts involving "acts or threats of physical violence to any person or property" are sufficient to support the nationwide injunction that it imposed. See *Glover*, 531 U.S. at 205 ("As a general rule . . . we do not decide issues outside the questions presented by the petition for certiorari. Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance." (citing Sup.Ct.R. 14.1(a))). As part of this inquiry, the court may find it necessary to interpret the language of the Hobbs Act, which provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce,

by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). Specifically, the court may need to determine whether the phrase "commits or threatens physical violence to any person or property" constitutes an independent ground for violating the Hobbs Act or, rather relates back to the grounds of robbery or extortion. In the alternative, the court may conclude that the proper interpretation of § 1951(a) is immaterial, if it decides that the four acts or threats of physical violence found by the jury are not sufficient standing alone to support the nationwide injunction. As the parties' Circuit Rule 54 submissions offer only a preliminary discussion of these issues, and neither this court nor the district court has addressed them previously, we consider it best to remand the case to the district court.

The February 26 order, in summary, thus concludes that one narrow question has yet to be resolved in the case. The Court did not have before it, and thus made no ruling on, the question whether four more predicate acts involving "acts or threats of physical violence to any person or property" could support a more narrow injunction. We concluded that the better part of wisdom was to remand that limited question to the district court.

II

The petitions for rehearing take issue with two aspects of our decision on remand: first, our finding that one issue remains in the case that needs to be tied up, and second, what the defendants believe is our implicit resolution of an important question of statutory interpretation regarding the scope of the Hobbs Act. Despite the arguments the dissenting judges have presented, we continue to believe that the Court's opinion left open the issue we identified. We take this opportunity to underscore the fact that we have not, at this point, ruled either

implicitly or explicitly on the Hobbs Act issue, for reasons of judicial economy and restraint. As we explain below, there is no need for this court to decide a question that may not even be pertinent to the case once the district court has looked at the points that remain on remand.

As we noted in the order reproduced above, the Supreme Court's opinion did not address the legal implications of the remaining four acts of physical violence. Indeed, any reader will see that the Court had nothing at all to say about them, for the understandable reason that they were not included in the petitions for *certiorari*. We have nothing to add on that point to what we have already written. With respect to the Hobbs Act dispute, which we describe in a moment, it seemed possible (perhaps even likely) that the district court might come to the conclusion that the four acts of physical violence are not sufficient standing alone to justify any injunction at all. It is not even clear whether the acts of violence were sufficiently well defined to justify any injunctive relief. Moreover, it is too late in the day for the plaintiffs to try to prove an entitlement to damages associated with those violations. They had their chance to do so when the case was tried in the district court, and there is nothing in the Supreme Court's opinion that would justify re-opening the original judgment on this point. The only remaining question, to repeat, is whether a different injunction, tailored to the violations found, would be appropriate. See, *e.g.*, *Missouri* v. *Jenkins*, 515 U.S. 70, 89 (1995). The district court is in the best position to decide what to do in these circumstances, given its extensive familiarity with the voluminous record in this case. This is not, however, an invitation either to the court or to the parties to re-open that record. If there is anything at all that is to be done, it must be based on the record that has already been built.

If and only if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury, that court will have to confront a more complex legal issue, namely, whether the acts or threats

of violence language in the Hobbs Act may serve as an independent predicate act under RICO. The relevant part of the Hobbs Act reads as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, *or commits or threatens physical violence* to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). As the defendants' petitions for rehearing and plaintiffs' answer demonstrate, there are two possible interpretations of this language. "First it may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion." Craig M. Bradley, *NOW* v. *Scheidler: RICO Meets the First Amendment*, 1994 SUP. CT. REV. 129, 142-43 (1994). We will refer to this as the "two-way" interpretation, where the two acts are robbery and extortion. "The other possible reading . . . forbids threatening or committing physical violence in furtherance of a plan to 'obstruct, delay, or affect commerce' (other than through robbery or extortion)." *Id.* at 143. Under the latter reading, the Hobbs Act identifies three different ways in which illegal interference with interstate commerce may occur: (1) by robbery, (2) by extortion, or (3) by physical violence. We will refer to this as the "three-way" interpretation.

The choice between these two competing interpretations is not obvious. Grammatically, the text can be read either way without undue strain. Moreover, there is no decisional law that throws light on which of the two readings is to be preferred. The Supreme Court has had no occasion to address the question. The Court has, however, had pertinent things to say about the scope of the Hobbs Act, and it has recently reaffirmed the utility of taking a "holistic" approach to questions of statutory interpretation, see *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 125

S. Ct. 460, 466-67 (2004). With that in mind, we take a closer look at this issue.

In *Stirone* v. *United States*, 361 U.S. 212 (1960), the Supreme Court described the Hobbs Act as follows: the "Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress had to punish interference with interstate commerce by extortion, robbery or physical violence." *Id.* at 215. This phraseology suggests that the Court saw three distinct types of predicate acts in the statute. See also *United States* v. *Peterson*, 236 F.3d 848, 851 (7th Cir. 2001); *United States* v. *Carmichael*, 232 F.3d 510, 516 (6th Cir. 2000); *United States* v. *Rodriguez*, 218 F.3d 1243, 1244 (11th Cir. 2000). None of these cases, however, squarely confronted the question whether an act of physical violence constitutes a distinct kind of predicate act – a point that the Ninth Circuit underscored in *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999), which held that *Stirone* did not resolve the issue and went on to adopt the two-way reading of the statute.

In their petition for rehearing, the defendants identify language in the Supreme Court's opinion in *NOW II* that, they argue, indicates that the Court itself has now opted for the two-way interpretation. But the passage to which they point offers at best a subtle indication, and at worst it is not helpful at all. In the course of discussing the legislative history of the Hobbs Act, the Court noted that Congress used the Penal Code of New York as a model for the Act. *NOW II* at 403. It emphasized that the New York Penal Code distinguished "between extortion and the separate crime of coercion," which "involved the use of force or threat of force to restrict another's freedom of action." *Id.* at 405. "With this distinction between extortion and coercion clearly drawn in New York law prior to 1946," the Court explained, "Congress's decision to include extortion as a violation of the Hobbs Act and omit coercion is significant assistance to our interpretation of the breadth of the extortion provision." *Id.* at 406. The Court acknowledged that "coercion and extortion certainly overlap to the extent that extortion

necessarily involves the use of coercive conduct to obtain property," but nonetheless it stressed that "there has been and continues to be a recognized difference between the two crimes, and we find it evident that this distinction was not lost on Congress." *Id.* at 407-08 (internal citations omitted). In drawing this conclusion and in declining to subsume the crime of coercion into the Hobbs Act's reference to "extortion," the Court quoted *McNally* v. *United States*, 483 U.S. 350 (1987), for the proposition that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *NOW II*, 537 U.S. at 409 (quoting *McNally*, 483 U.S. at 359-60); see also *Leocal* v. *Ashcroft*, 125 S. Ct. 377, 384 n. 8 (2004). It thus concluded that "[i]f the distinction between extortion and coercion, which we find controls these cases, is to be abandoned, such a significant expansion of the law's coverage must come from Congress, and not from the courts." 537 U.S. at 409.

This discussion, however, addressed the question whether the definition of extortion was elastic enough to encompass the acts of coercion whereby the defendants and their allies were attempting to block women from clinics where abortions were performed. The focus was on the deprivation of the women's right to obtain the services they desired and whether that amounted to "extortion." It is true that the New York Penal Code defined coercion to include certain acts or threats of violence against persons or property, see *NOW II*, 537 U.S. at 406 n. 10 (quoting from New York Penal Code § 530 (1909)). It is also true that the Court concluded that Congress affirmatively chose not to list "coercion" as a separate ground for Hobbs Act liability. Nonetheless, the Court was not addressing the analytically distinct question whether the conduct at issue could be considered as acts of violence that obstructed, delayed, or affected interstate commerce, or that obstructed, delayed, or affected the movement of articles or commodities in commerce. Had it done so, one might have expected some discussion of cases like *United States* v. *Morrison*, 529 U.S. 598

(2000) (holding in part that the Violence Against Women Act could not be sustained as a regulation of activity affecting interstate commerce) and *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding in part an injunction protecting access to abortion clinics entered pursuant to state law); see also 18 U.S.C. § 248 (freedom of access to clinics), upheld in *United States* v. *Wilson*, 154 F.3d 658 (7th Cir. 1998). No such discussion appears, for the simple reason that the issue was not before the Court.

The Sixth and Ninth Circuits have both had occasion to address the question how the Hobbs Act should be interpreted. See *United States* v. *Yankowski, supra*, 184 F.3d 1071; *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975). They both have concluded that the Act establishes just two RICO predicate acts – robbery and extortion – and that the phrase "or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section" simply modified the words "robbery" and "extortion." In *Yankowski*, the Ninth Circuit considered the question whether an anti-abortion protester who set fire to a clinic roof could be convicted under the Hobbs Act. See 184 F.3d at 1072. The court rejected the three-part reading of the Act, explaining that "the statutory language clearly requires that the violent act pertain to a violation of *this section*, not merely to a violation of 'the law' generally." *Id.* at 1073. On that basis, it concluded that "[a] person may violate the Hobbs Act by committing or threatening a violent act against person or property, but only if it is in furtherance of a plan to interfere with commerce *by extortion or robbery*." *Id.* In support of that interpretation, the court relied on the language of the predecessor to the Hobbs Act, the Anti-Racketeering Act of 1934, which it described as providing that "[a]ny person who, in connection with or in any degree affecting trade or commerce (a) commits or attempts extortion of money, or (b) obtains property through extortion, or (c) 'commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate

sections (a) or (b),' or (d) conspires with respect to (a), (b), or (c)... shall be imprisoned or fined." *Id.* at 1073 n. 5. The Sixth Circuit came to essentially the same result in *Franks, supra*.

Notably, in both *Yankowski* and *Franks* the government had argued unsuccessfully that the statute described three independent predicate acts. It appears to us that the United States may still be taking that position with respect to the scope of the Hobbs Act for purposes of criminal prosecutions, though we cannot be sure without requesting the views of the Solicitor General. We note, however, that in an unpublished opinion, the Fourth Circuit stated that "[t]here are two essential elements of a Hobbs Act conviction: interference with interstate commerce, and a crime of robbery, extortion or violence." *United States* v. *Milton*, 153 F.3d 724, 1998 WL 468812, at *1 (4th Cir. Aug. 4, 1998). It seems likely that this court was expressing agreement with the position of the government, though once again, it is impossible to know.

The defendants also invoke the rule of lenity mentioned by the Supreme Court in *NOW II* and *Leocal* in support of the two-way interpretation. But this argument is premised on the doomsday scenario they foresee if the Act is read to permit three independent predicate acts. They predict that under the three-way interpretation, "the traditional state-law offenses of malicious destruction of property, reckless endangerment, and even assault would be Hobbs Act violation punishable by 20 years in federal prison." Operation Rescue adds that this would make the Hobbs Act a "breath-takingly broad general federal anti-violence statute" and it would raise "obvious constitutional problems" under the Supreme Court's Commerce Clause jurisprudence. In our view, these predictions greatly overstate the case. The Hobbs Act itself contains a jurisdictional element that limits its application to anyone who "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a); see also *Jones* v. *United States*, 529 U.S. 848 (2000) (adopting a narrow interpretation of the federal arson statute, 18 U.S.C. § 844(i), to avoid

constitutional problems). We are satisfied that we have a normal question of statutory interpretation before us and that the sky is not likely to fall whichever way it is resolved.

The plaintiffs argue that the "plain" text of § 1951 favors their position. They adopt the reasoning offered by Professor Bradley:

> [The Hobbs Act] may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion. But this interpretation makes no sense! Robbery and extortion frequently involve the commission (robbery) or threat (extortion) of violence, though "extortion" covers other threats as well. Moreover, the "robbery and extortion" clauses also forbid "attempts" and conspiracies. Thus, under this reading, the "physical violence" clause would be less inclusive, and hence would add nothing, to the preceding "robbery" and "extortion" clauses. One who commits violence in furtherance of a plan to commit robbery or extortion has either committed, attempted, or conspired to commit robbery or extortion and thus has violated the first clause, rendering the third clause nugatory.

Bradley, *supra*, at 142-43. At a minimum, it is hard to argue with the proposition that any reading of the Hobbs Act ought to take into account the statute as a whole. That means that the language of § 1951(a) should be understood in light of the definitions provided by § 1951(b). In the latter subsection, the Act defines "robbery" and "extortion" so that they already cover all acts of physical violence that are undertaken in furtherance of the respective offense. "Robbery" is defined in part as "the unlawful taking or obtaining of personal property from the person . . . against his will, by means of *actual or threatened force, or violence, or fear of injury*, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1) (emphasis added). Likewise, "extortion" is defined as "the obtaining of property from another, with his consent, induced by wrongful use of

actual or threatened force, violence, or fear, or under color of official right." *Id.* at § 1951(b)(2) (emphasis added).

Recognizing the well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless, the defendants have tried to think of cases in which the "physical violence" clause would cover individuals who were acting in furtherance of a plan to commit robbery or extortion, but whose acts do not already fall within the definitions of robbery, extortion, or attempts or conspiracies to rob or extort. Their efforts reveal the difficulty they face in this connection. Anyone who commits physical violence to a person or property in furtherance of a plan of robbery or extortion would almost certainly be found to have attempted one of those crimes, or, if others are involved, to have conspired to commit one or the other. Operation Rescue, for instance, offers the example of the "subordinate 'enforcer' who, while not himself extorting or robbing anything, harms people or property when the extortionist or robber does not obtain the desired payment from the victim." But such a subordinate "enforcer" would fall squarely within the Act's conspiracy language. Another example the defendants offer is the case of one who threatens violence in furtherance of a "personal" plan to rob a bank or to commit extortion, without either conspiring with anyone else or taking enough steps to amount to an attempted crime. It is hard to see how such a remote threat could be in furtherance either of extortion or robbery (defendants' view) or in furtherance of a plan to "obstruct, delay" or otherwise hamper the movement of goods in commerce (plaintiffs' view). It seems unlikely that Congress included the "violence" language to capture such a tiny set of academic hypotheticals.

Even if one were to conclude that the plain language approach favors the interpretation urged by the plaintiffs, there is still legislative history to consider. The defendants argue that the legislative history of the Hobbs Act should be allowed to trump the result one reaches looking at the statute as a whole. Many judges believe that legislative history should be used, if

at all, only to disambiguate language that does not yield to any other mechanism. The Supreme Court's *Koons Buick* decision indicates that legislative history is also appropriate if the plain language leads one to an absurd result. But we see nothing absurd in the three-way interpretation the plaintiffs have urged. To the contrary, it is the approach favored by the defendants that threatens to leave one with an entire clause in the statute that has no meaningful function to perform.

Having said that, we acknowledge that the legislative history indicates that Congress was principally concerned with the effects of robbery and extortion on interstate commerce (though it never affirmatively negated the three-way interpretation, either at the time of the 1948 revision of the Criminal Code or thereafter). See generally *Callanan* v. *United States*, 364 U.S. 587, 591 & n. 5 (1961). Until the 1948 revision and codification of Title 18 of the U.S. Code, the statute explicitly linked the "acts of physical violence" clause to the prohibition on robbery and extortion. See Pub. L. No. 486, 60 Stat. 420 (1946). In 1948, however, the Act assumed its present form. See Pub. L. No. 772, 62 Stat. 793-94 (1948). While these revisions were intended to be formal, stylistic changes, it is not beyond the realm of possibility that the revisers may have made certain substantive changes, either advertently or inadvertently. Compare, for example, the similar fate of the Judicial Code, which was recodified at the same time as the Criminal Code, and which changed in a number of substantive respects as a result. See generally William W. Barron, The Judicial Code, 8 F.R.D. 439 (1948-49). Moreover, the present form of the Act has been in effect for more than 55 years, and the safest approach may be to take it at face value.

III

We continue to believe, as we did when the February 26 order was issued, that it would be imprudent to resolve this problem of statutory interpretation at this stage of the litigation of this particular case. Most importantly, as we indicated at the outset of this opinion, it may be unnecessary to the resolution of

this case. Second, the brief discussion we have included in this opinion demonstrates that the issue is a complex one that deserves not only full briefing and participation by all parties, but also input from the United States, given the effect of any ruling on the scope of the Hobbs Act with or without RICO in the picture. Rather than launch such an ambitious project at the tail end of litigation that has been running for almost twenty years, we prefer a wait-and-see approach.

In closing, we wish to re-emphasize that this remand is not a "green light" to start this old litigation anew. The plaintiffs have lost their bid to have a nationwide injunction based on the 117 acts that the Supreme Court has now decreed do not qualify as "extortion" for purposes of the Hobbs Act and RICO. From what we can tell of the record, it appears that it would be an abuse of discretion for the district court to re-enter any nationwide injunction based only on the four remaining acts of violence found by the jury. Such an injunction would violate the rule requiring courts to tailor injunctive relief to the scope of the violation found. We note as well that the Freedom of Access to Clinic Entrances Act, 18 U.S. § 248, has now been in effect for five more years since the district court first considered the necessity of a nationwide injunction, and experience may require a reassessment of the Act's impact. Finally, it is too late in the day for the plaintiffs to try to seek additional damages relief for acts that they could have addressed at the original trial. The only remaining question is therefore whether any injunction is appropriate to redress the four acts of physical violence that the jury found had taken place and that were not encompassed within the Supreme Court's ruling. This does not open Pandora's Box. It merely resolves the final loose ends in this long-running litigation in a manner that is fair to both sides and that acknowledges the need to resolve all properly presented issues.

The case is REMANDED to the district court for further proceedings consistent with this opinion.

MANION, *Circuit Judge*, joined by KANNE, *Circuit Judge*, dissenting from the denial of petition to rehear en banc. Following more than eighteen years of litigation, a seven-week jury trial, and two trips to the United States Supreme Court, the Supreme Court held in *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), that "*all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," and that "*[w]ithout an underlying RICO violation*, the injunction issued by the District Court must necessarily be vacated." *Id.* at 410 (emphasis added). Nonetheless, on remand, a panel of this court concluded that not "*all* of the predicate acts" were reversed, but that the jury's finding of four predicate acts or threats of violence remained viable. *National Org. for Women, Inc.* v. *Scheidler*, 2004 WL 375995, at *3 (7th Cir. Feb. 26, 2004). Today on rehearing, the panel reaffirms that remand order, while unnecessarily debating, but not deciding, the scope of the Hobbs Act. Because I believe that the Supreme Court meant what it said, and because, in any event, the underlying four predicate acts of violence cannot, as a matter of law, constitute an independent violation of the Hobbs Act, I dissent from the denial of the petition for rehearing en banc.

The facts and procedural history of this case are provided in detail in the Supreme Court's decision in *Scheidler*. In short, in *Scheidler*, following a seven-week trial, a jury concluded that Scheidler and other individuals and organizations violated the civil provisions of RICO: the jury concluded that the defendants committed 21 violations of the Hobbs Act, 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 23 instances of attempting to violate the Travel Act, and four acts or threats of physical violence to any person or property.[1] The jury awarded plaintiff, the National Women's

[1] The plaintiffs acknowledge that the "acts or threats of physical violence" predicate acts were based on the Hobbs Act, 18 U.S.C. § 1951(a), and were not state law claims.

Health Organization of Delaware, Inc., $31,455.64, and the National Women's Health Organization of Summit, Inc., $54,471.28, with the damages trebled under RICO. The district court then entered an injunction prohibiting certain illegal protest actions. The defendants appealed to this court and this court affirmed. *National Org. for Women, Inc.* v. *Scheidler*, 267 F.3d 687 (7th Cir. 2001). The Supreme Court granted certiorari "to answer two questions. First, whether petitioners committed extortion within the meaning of the Hobbs Act, 18 U.S.C. § 1951. Second, whether respondents, as private litigants, may obtain injunctive relief in a civil action pursuant to 18 U.S.C. § 1964 of the Racketeer Influenced and Corrupt Organization Act (RICO)." *Id.* at 397.

On appeal, the Supreme Court first considered whether the defendants committed extortion within the meaning of the Hobbs Act. The Court held that the crime of extortion under the Hobbs Act required the defendants to obtain or to seek to obtain property. The Court then concluded: "Because we find that petitioners did not obtain or attempt to obtain property from respondents, we conclude that there was no basis upon which to find that they committed extortion under the Hobbs Act." *Id.* The Court did not end there, however, because "[t]he jury also found that petitioners had committed extortion under various state-law extortion statutes, a separate RICO predicate offense." *Id.* at 409. Thus, the Court considered whether the verdicts could stand based on the jury's findings of state law extortion. Again, the Court concluded "[b]ecause petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed." *Id.* at 410. Having disposed of the Hobbs and state extortion predicate acts, the Supreme Court then concluded that "[t]he 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But we have already determined that petitioners did not commit or attempt to commit extortion." *Id.* at 410.

Significantly, the Supreme Court then held: "Because *all* of the predicate acts supporting the jury's findings of a RICO violation *must be reversed*, the judgment that petitioners violated RICO *must also be reversed*. Without an underlying RICO violation, the injunction issued by the District Court *must necessarily be vacated*. We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964. The judgment of the Court of Appeals is accordingly *Reversed*." *Id.* at 411 (emphasis added). The Supreme Court then entered an order stating "that the judgment of the above court in these cases is reversed with costs, and the cases are remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court." At that point, we should have closed the case.

But even with the Supreme Court's explicit holding that "*all* of the predicate acts supporting the jury's findings of a RICO violation *must be reversed*," and its directive that "the injunction issued by the District Court *must necessarily be vacated*," our court remanded this case to the district court for further proceedings, namely to determine "whether the four predicate acts involving 'acts or threats of physical violence to any person or property' are sufficient to support the nationwide injunction that it imposed." *Scheidler*, 2004 WL 375995, at *3. The panel reasoned that remand was necessary because the Supreme Court had not granted certiorari on that issue and, therefore, the question remained open. In my view, the order directly conflicts with the Supreme Court's opinion. It also rests on an impermissible reading of the Hobbs Act, and unnecessarily revives a case that is already more than eighteen years old.

Although the Supreme Court did not expressly consider whether the jury's finding of four predicate acts of violence to persons or property could support the jury's verdict on the plaintiffs' RICO claim, the Supreme Court clearly stated that "*all* of the predicate acts supporting the jury's finding of a

RICO violation *must be reversed.*" This unequivocal holding negates any reasonable inference that those four predicate acts remain an issue. The panel concludes otherwise by noting that the Supreme Court did not grant certiorari to resolve that issue.

But, the Supreme Court did specifically grant certiorari to consider the question of whether a private litigant in a civil RICO action is entitled to injunctive relief, but then found it unnecessary to address that question because there was no "underlying RICO violation . . . ." *Scheidler*, 537 U.S. at 411. This is significant because if the four threats or acts of violence claims remained viable, as the panel concludes and the plaintiffs argue, there would be an "underlying RICO violation," and it would have been necessary for the Supreme Court to address the second question for which it had granted certiorari. Yet, the Supreme Court expressly stated that because there was no underlying RICO violation, it was unnecessary to consider whether private litigants could obtain injunctive relief under RICO. *Id.* at 411. Thus, the panel's remand order, which allows for the possibility that there is still an "underlying RICO violation," is again inconsistent with the Supreme Court's opinion.

Moreover, although the Supreme Court did not grant certiorari to consider the state law extortion claims or the Travel Act claims, it nonetheless considered the validity of those claims, as they depended entirely on the Supreme Court's resolution of the extortion claims for which it had granted certiorari. *See Scheidler*, 537 U.S. at 410 ("The 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But we have already determined that petitioners did not commit or attempt to commit extortion."); *id.* ("Because petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed."). Similarly, as discussed below, the four predicate acts of violence to persons or property depend

on the viability of the extortion claims in this case. By holding that the defendants did not commit extortion, it necessarily follows that the four predicate acts also cannot support the RICO verdict. True, the Supreme Court expressly addressed the state law extortion claims and the Travel Act claims, but did not mention the four violence against person or property claims. But that is not surprising given that on appeal before the Supreme Court, the plaintiffs discussed those claims, and specifically argued that "even without the Hobbs Act predicates, the jury's verdict would stand on the 25 state extortion predicates." The plaintiffs, however, did not argue that the four predicate acts of violence against persons or property independently justified the jury's verdict. Therefore, the Supreme Court found no need to expressly address that question. But its holding that "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed . . ." is conclusive.

One could argue that the Supreme Court made a mistake when it stated that "*all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," and that "*[w]ithout an underlying RICO violation*, the injunction issued by the District Court must necessarily be vacated." *Scheidler*, 537 U.S. at 411 (emphasis added). But if so, the appropriate procedure would have been for the plaintiffs to seek rehearing from the Supreme Court. This court cannot ignore the Supreme Court's mandate merely because the Supreme Court might not have meant what it said.

Even assuming that the panel's remand order could be labeled a reasonable interpretation of the Supreme Court's opinion, the four predicate acts of violence to persons or property cannot, as a matter of law, constitute a violation of the Hobbs Act, as the plaintiffs argue. Specifically, the plaintiffs argue that the Hobbs Act make it illegal to interfere with interstate commerce by: (1) robbery, (2) extortion, or (3) physical violence. The plaintiffs' argument is misplaced, as the plain language of the Hobbs Act makes clear.

The Hobbs Act provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951.

The plain language of the Hobbs Act makes clear that it does not make threats of "physical violence to any person or property" illegal. Rather, it prohibits threats of "physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section*." Thus, for the four acts or threats of violence to constitute a violation of the Hobbs Act, they must have been for purposes of obstructing, delaying or affecting commerce "by robbery or extortion." *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999); *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975). Yet, the Supreme Court held that the facts in this case did not support a finding of extortion, as a matter of law. (And the plaintiffs do not make a claim of robbery.) Accordingly, there is no possible Hobbs Act violation and the remaining four predicate acts, like the Travel Act claims, cannot, as a matter of law, support a RICO verdict.[2]

---

[2] There is yet another reason that further proceedings on remand are unnecessary. In remanding the Hobbs Act question, the panel on rehearing instructs that "[i]f there is anything at all that is to be done, it must be based on the record that has already been built." Slip op. at 8. However, the record, as it currently exists, fails to establish that the four acts of violence involved interstate commerce. As the panel recognizes, slip op. at 13, the Hobbs Act violation must "affect [ ] commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a). In this case, though, the jury did not determine that the four acts or violence affected commerce: The Special Interrogatories and Verdict Form did not ask the jury to decide separately whether each alleged predicate act involved interstate

Nonetheless, on rehearing the panel unnecessarily sets up a debate on the meaning of the Hobbs Act, positing as plausible two different interpretations of the Hobbs Act – what the panel dubs a "two-way" and a "three-way" interpretation. *Scheidler* slip op. at 9. Using the panel's jargon, a "two-way" interpretation of the Hobbs Act allows for only two independent ways to violate the Hobbs Act: 1) Robbery or 2) Extortion. The three-way interpretation, according to the panel, provides for a third: 3) Physical violence to any person or property.

Although the panel refuses to resolve the debate and instead "underscore[s] the fact that we have not, at this point, ruled either implicitly or explicitly on the Hobbs Act issue," slip op. at 7, the panel nonetheless states that "[g]rammatically, the text can be read either way without undue strain," *id.* at 9, and it concludes that "we see nothing absurd in the three-way interpretation the plaintiffs have urged." *Id.* at 16. However, contrary to the panel's conclusion, the three-way interpretation is not plausible given the plain language of the Hobbs Act. As explained above, the "physical violence to any person or property" clause of the Hobbs Act, states in its entirety: "or commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of this section*, . . ." Thus, the only way "physical violence" constitutes a violation of the Hobbs Act is if it (in addition to satisfying the interstate commerce requirement) is in furtherance of "robbery" or "extortion.["] *Yankowski*, 184 F.3d 1071; *Franks*, 511 F.2d 25. Clearly, under the Hobbs Act, physical violence to any person or property is confined to

---

commerce. Rather, Special Interrogatory 8 asked whether "any of the acts that you found in Question 4 above affect[ed] interstate commerce?" The jury answered "yes" to that question, but the jury did not specify which of the acts listed in Interrogatory 4 included eight sub-components, (a)–(h), only one of which involved the acts or threats of physical violence to any person or property, which the remand order indicates remain viable. Because the jury did not specifically conclude that those acts affected interstate commerce, on the record as it stands, no Hobbs Act violation could exist.

furthering robbery or extortion. It does not stand alone as a separate violation. The full court should decide this clear question of law now, instead of presenting competing theories for the district court to resolve on remand.

Although an order for a reversal and remand from the Supreme Court is not the typical case for which *en banc* is appropriate, procedurally that is the only option available to the defendants before this court. Given the age of this case, remanding to the district court unnecessarily wastes additional judicial resources. Granted, it is hard to see how four acts of violence committed nearly twenty years ago – and well before Congress enacted the Freedom of Access to Clinic Entrances Act – would justify an injunction in 2005. It is likely and certainly appropriate that the district court will dispose of the case promptly on that basis. But even that most likely result requires additional resources of the parties and the judicial system. This is unnecessary because the Supreme Court's holding that there was no extortion means that no Hobbs Act violation possibly exists. Moreover, if the district court on remand somehow finds an injunction appropriate, then it will be required to choose between the two legal options the panel presents. The losing side would surely appeal, presenting the pure issue of law that this court would have resolved by now had we considered it en banc.

Absent a writ of mandamus from the United States Supreme Court, *see In re Blodgett*, 502 U.S. 236, 240-41 (1992) (denying a petition for the writ of mandamus directed toward the Ninth Circuit without prejudice, but stating that such relief would be available if the circuit court caused an unwarranted delay in the case's disposition), the defendants face an unnecessary remand. I therefore DISSENT from the denial of rehearing en banc. *Id.*

APPENDIX B

United States Court of Appeals,
Seventh Circuit.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Plaintiffs-Appellees,
v.
Joseph M. SCHEIDLER, et al., Defendants-Appellants.

Nos. 99-3076, 99-3336, 99-3891, 99-3892, 01-2050.

Submitted Feb. 26, 2003.
Decided Feb. 26, 2004.

On Remand from the Supreme Court of the United States.

Before ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

ORDER

This case comes to us on remand from the Supreme Court of the United States.

In 1986, the National Organization for Women (NOW) and two health clinics that perform abortions ("plaintiffs"), filed this class action alleging that defendants, a coalition of antiabortion groups called the Pro-Life Action Network (PLAN), Joseph Scheidler, and other individuals and organizations that oppose abortion, engaged in conduct amounting to a pattern of extortion in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). A more detailed account of the facts and the lengthy procedural history of this litigation is provided in the Supreme Court's first opinion in this case, *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*NOW I*), and in our prior decisions, *National Organization for Women, Inc.* v. *Scheidler*,

267 F.3d 687 (7th Cir. 2001), and *National Organization for Women, Inc.* v. *Scheidler*, 968 F.2d 612 (7th Cir. 1992).

After the Court in *NOW I* remanded the case, the district court conducted a seven-week trial, at which the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. In response to special interrogatories, the jury found that the defendants or others associated with PLAN committed 21 violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 18 U.S.C. § 1952, 23 instances of attempting to violate the Travel Act, and four "acts or threats of physical violence to any person or property." On this basis, the jury awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants appealed a number of issues relating to the conduct of the trial and the issuance of the injunction. We affirmed the district court's judgment in all respects. *Scheidler*, 267 F.3d at 693.

The defendants then filed a petition for a writ of certiorari with the United States Supreme Court, which the Court granted with respect to two of the three questions presented by the petition. *Scheidler* v. *Nat'l Org. for Women, Inc.*, 535 U.S. 1016 (2002). Specifically, the Court limited its grant of certiorari to the following questions:

> 1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO].
>
> 2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery

> or extortion" [–] and which defines "extortion" as "the obtaining of property from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear" – criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

Pet. for Writ of Cert., 2002 WL 32134867 (U.S. Jan 28, 2002) (No. 01-1118) (internal citation omitted). In its opinion, the Court explained that it granted certiorari to determine "whether petitioners committed extortion within the meaning of the Hobbs Act" and "whether respondents, as private litigants, may obtain injunctive relief in a civil action" under RICO. *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 397 (2003) (*NOW II*). The Court held that "petitioners did not commit extortion because they did not 'obtain' property from respondents as required by the Hobbs Act," and this determination "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Id.* It therefore "reverse[d] without reaching the question of the availability of private injunctive relief under § 1964(c) of RICO," *id.*, and held that "[w]ithout an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated," *id.* at 411.

On remand to this court, the parties submitted Statements of Position pursuant to Circuit Rule 54. Plaintiffs argue that, although the Court in *NOW II* disposed of the 117 extortion-based predicate acts under RICO, the defendants did not petition for a writ of certiorari on the four predicate acts involving "acts or threats of physical violence to any person or property" and, accordingly, the Court did not decide whether these acts alone could support the district court's injunction. In response, defendants contend that the Hobbs Act does not outlaw "physical violence" apart from extortion and robbery, and

therefore the Supreme Court's holding that the defendants did not commit extortion precludes a finding that the four acts or threats of violence might independently support the injunction. We remand to the district court to address the issue – which never before in this litigation has been the subject of full briefing or judicial consideration – in the first instance.

Although "[a]n order limiting the grant of certiorari does not operate as a jurisdictional bar," *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 (1981), the Supreme Court has consistently adhered to its Rule 14.1(a), which provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." See *Toyota Motor Mfg., Inc.* v. *Williams*, 534 U.S. 184, 202 (2002); *Glover* v. *U.S.*, 531 U.S. 198, 205 (2001). Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari, see, *e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001); *West* v. *Gibson*, 527 U.S. 212, 223 (1999); *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 140 (1998), we will not presume that in this case it went beyond the scope of its grant of certiorari, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction. We note that the Court's opinion in *NOW II* makes no mention of these four predicate acts, and the parties' briefs before the Court reference these acts only in passing in footnotes. To conclude that the Court found these four predicate acts insufficient to support the district court's injunction would therefore require that we find both that the Court went beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion. We decline to draw such a conclusion.

Instead, we remand to the district court to determine whether the four predicate acts involving "acts or threats of physical violence to any person or property" are sufficient to support the nationwide injunction that it imposed. See *Glover*,

531 U.S. at 205 ("As a general rule . . . we do not decide issues outside the questions presented by the petition for certiorari. Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance." (citing Sup. Ct. R. 14.1(a))). As part of this inquiry, the court may find it necessary to interpret the language of the Hobbs Act, which provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). Specifically, the court may need to determine whether the phrase "commits or threatens physical violence to any person or property" constitutes an independent ground for violating the Hobbs Act or, rather, relates back to the grounds of robbery or extortion. In the alternative, the court may conclude that the proper interpretation of § 1951(a) is immaterial, if it decides that the four acts or threats of physical violence found by the jury are not sufficient standing alone to support the nationwide injunction. As the parties' Circuit Rule 54 submissions offer only a preliminary discussion of these issues, and neither this court nor the district court has addressed them previously, we consider it best to remand the case to the district court.

We therefore REMAND this case to the district court for further proceedings consistent with *NOW II* and this order.

APPENDIX C

United States Court of Appeals
for the Seventh Circuit

Nos. 99-3076, 99-3336, 99-3891, 99-3892
and 01-2050

National Organization for Women, Inc., on behalf of itself and its women members and all other women who use or may use the services of women's health centers that provide abortions, and Delaware and Summit Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on behalf of themselves and the class of all women's health centers in the United States at which abortions are performed, Plaintiffs-Appellees,

v.

Joseph M. Scheidler, Pro-Life Action League, Inc., Andrew D. Scholberg, Timothy Murphy, and Operation Rescue, Defendants-Appellants.

Argued Sept. 14, 2000.
Decided Oct. 2, 2001.
Petition for Rehearing and Rehearing En Banc
Denied Oct. 29, 2001.

Before ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

DIANE P. WOOD, Circuit Judge.

This case is in its fifteenth year of contentious litigation. The defendants are anti-abortion activists who employ a protest tactic they call "rescues," in which they and other activists physically block access to abortion clinics so that the patients and staff cannot get in or out of the buildings. Plaintiffs use words less benign than "rescue" to describe the defendants' activities. We will refer to them as "protest missions," in the hopes that this will be understood as a neutral term. The defendants' goal is frankly to prevent abortions from taking place. Participants in the protest missions engage in a substantial amount of protected speech, including efforts to persuade clinic patients not to have abortions and to persuade clinic doctors and staff to quit performing abortions. Unfortunately, the protest missions also involve illegal conduct: protesters do everything from sitting or lying in clinic doorways and waiting to be arrested to engaging in more egregious conduct such as entering the clinics and destroying medical equipment and chaining their bodies to operating tables to prevent the tables from being used. In a few instances, protesters apparently have physically assaulted clinic staff and patients. In addition to staging these protests, the defendants have issued letters and statements to other clinics threatening to stage missions at those clinics unless they voluntarily shut down.

The plaintiffs, the National Organization for Women (NOW) and two clinics that were the targets of protest missions, brought this class action alleging, among other things, that the defendants' conduct amounted to a pattern of extortion which violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). The trial judge certified two classes: one, represented by NOW, of all NOW members and non-members who have used or would use the services of an abortion clinic in the United States, and a second of all such clinics. After a trip through this court to the Supreme Court of the United States during which many of the legal issues in the case were clarified or resolved, the case was remanded to the district court for trial of the plaintiffs' RICO claims. A jury

found for the plaintiffs and awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants have appealed a wide range of issues relating to the conduct of the trial and the issuance of the injunction. We find that the district court navigated its way through this complex and difficult case with care and sensitivity and affirm its judgment in all respects.

I

Many of the facts pertinent to this opinion are set out in the Supreme Court's decision remanding the case, *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994) (*NOW I*), and in our earlier decision in the case, *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), and we will not recount them in detail here. Nonetheless, in order to put the defendants' appeal in context, a brief overview of the facts presented at trial and of the procedural history of the case may be helpful.

The individual defendants, Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are on the Board of Directors of one of the corporate defendants, the Pro-Life Action League (PLAL). The other corporate defendant is Operation Rescue. (Randall Terry, the director of Operation Rescue, was also originally a defendant in the case, but he has since settled with the plaintiffs). All of the defendants were among the organizers of the Pro-Life Action Network (PLAN), which is a loose national organization of groups that engage in protest missions and other aggressive anti-abortion tactics. Beginning in the mid-1980's, PLAN held annual conventions, organized in part by the defendants here, which included seminars on protest strategies. Those conventions concluded with protest missions being staged in the convention city. PLAN also sent a newsletter to its members and coordinated a hotline that potential protesters could call to get information about upcoming missions. The

plaintiffs alleged, and at trial the jury found, that PLAN was an "organization or enterprise" for purposes of RICO liability.

Initially, the plaintiffs alleged that the defendants' tactics violated both RICO and federal antitrust law. In 1992, however, this court issued an opinion dismissing both theories of liability, reasoning that the antitrust laws were not applicable because the plaintiffs had not alleged that the defendants exercised any form of market control over the supply of abortion services and that RICO did not reach the defendants' conduct because the plaintiffs had not shown that the alleged racketeering acts were "economically motivated." 968 F.2d at 617-30. The Supreme Court granted certiorari on the limited question whether RICO requires proof that either the racketeering enterprise or the alleged predicate acts were motivated by an economic purpose. (The antitrust holding of our 1992 decision was thus left undisturbed.) The Court concluded that RICO contains no such economic motive requirement and therefore reversed our decision on that point. 510 U.S. at 256-62, 114 S. Ct. 798. Thereafter, we remanded the case to the district court for trial of the plaintiffs' RICO claims.

During the course of the seven-week trial, the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. The alleged predicate acts included violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), state extortion law, the federal Travel Act, 18 U.S.C. § 1952, and conspiracy to violate these laws. A few of the more egregious acts the plaintiffs alleged included:

At a protest mission in Chico, California, protesters pressed four clinic staff members up against a glass entranceway to the clinic for several hours and refused to let them go even when they complained they were being crushed. The glass wall eventually either loosened or shattered, injuring a clinic staffer.

At a similar mission in Los Angeles, protesters grabbed at a patient's arms and legs and tried to restrain her physically from entering the clinic. The patient was actually at the clinic for a follow-up to ovarian surgery, and the attack by the protesters reopened her incisions. As a result of the attack, the patient had to be rushed to the hospital.

In several instances, protesters entered clinics and destroyed medical equipment.

In several cases, protesters not only blocked doorways with their bodies, but chained themselves to the doorways of clinics, or, in some cases, to operating tables inside clinics.

In December 1985, defendant Scheidler sent letters to every abortion provider in the Chicago area calling for a "Christmas Truce." In these letters, he requested that the clinics shut down for a specific day in December, stated that he would "call to confirm" the clinic's decision, and warned that non-complying clinics would be subjected to "non-violent direct action," a catch-phrase PLAN and PLAL frequently used for their activities.

Based on this and other evidence in the voluminous record that was created at the trial, the jury found in response to special interrogatories that the defendants or others associated with PLAN committed 21 violations of the Hobbs Act, 25 violations of state extortion law, 25 acts of conspiracy to violate federal or state extortion law, four acts or threats of physical violence, 23 violations of the Travel Act, and 23 attempts to commit one of these crimes. The jury awarded damages to both clinics; once the damages were trebled, as RICO requires, the awards totaled over $163,000 to Summit Women's Health Organization and over $94,000 to Delaware Women's Health Organization.

After the jury returned its verdict, the district court held three days of additional hearings and then entered a permanent, nationwide injunction prohibiting the defendants or those acting in concert with them from interfering with the rights of the class clinics to provide abortion services, or with rights of the class

women to receive those services, by obstructing access to the clinics, trespassing on clinic property, damaging or destroying clinic property, or using violence or threats of violence against the clinics, their employees and volunteers, or their patients.

II

Initially, we must consider the defendants' contention that RICO does not permit private plaintiffs to seek injunctive relief. The only court of appeals to have addressed this issue directly, the Ninth Circuit, concluded in 1986 that private plaintiffs cannot seek injunctions under RICO, relying largely on the court's reading of the statute's legislative history. See *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986). The other courts of appeals that have addressed the point in *dicta* are split. Compare *Johnson v. Collins Ent'mt. Co.*, 199 F.3d 710, 726 (4th Cir. 1999), *In re Fredeman Litig.*, 843 F.2d 821, 828-30 (5th Cir. 1988), and *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28-29 (2d Cir. 1983) (expressing doubt about availability of injunctive relief for private plaintiffs), with *Bennett v. Berg*, 710 F.2d 1361, 1366 (8th Cir. 1983) (McMillan, J., concurring) (suggesting injunctive relief is available); see also *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990), *Northeast Women's Ctr. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir. 1989) (noting controversy but expressing no opinion on resolution). Our study of Supreme Court decisions since the 1986 *Wollersheim* opinion convinces us that the approach of the Ninth Circuit (which relied almost exclusively on the legislative history of RICO to reach its result, as opposed to the actual language of the statute) no longer conforms to the Court's present jurisprudence, assuming for the sake of argument that it was a permissible one at the time. We are persuaded instead that the text of the RICO statute, understood in the proper light, itself authorizes private parties to seek injunctive relief.

In interpreting the remedial provisions of the RICO statute, our inquiry begins with the statute's text, and, if the text is unambiguous, it ends there as well. See *Alexander v. Sandoval*, 531 U.S. 1049, 121 S. Ct. 1511, 1520-21 & n. 7, 149 L. Ed. 2d

517 (2001); *NOW I*, 510 U.S. at 261, 114 S. Ct. 798. RICO's civil remedies section provides, in pertinent part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to . . . imposing reasonable restrictions on the future activities . . . of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, . . . or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

18 U.S.C. § 1964.

Both parties have offered interpretations of this text that support their positions. The plaintiffs read the statute in a straightforward manner. Section 1964(a), they contend, grants the district courts jurisdiction to hear RICO claims and also sets out general remedies, including injunctive relief, that all plaintiffs authorized to bring suit may seek. Section 1964(b) makes it clear that the statute is to be publicly enforced by the Attorney General and it specifies additional remedies, all in the nature of interim relief, that the government may seek. Section 1964(c) similarly adds to the scope of § 1964(a), but this time for private plaintiffs. Those private plaintiffs who have been

injured in their business or property by reason of a RICO violation are given a right to sue for treble damages. As the plaintiffs note, this reading of the statute gives the words their natural meaning and gives effect to every provision in the statute.

The defendants argue for a less intuitive interpretation. Relying on *Wollersheim*, they argue that § 1964(a) is purely a jurisdictional provision authorizing the district court to hear RICO claims and to grant injunctions to parties authorized by other provisions of the law to seek that form of relief. Section 1964(b), in the defendants' view, allows the Attorney General to institute RICO proceedings and authorizes the government to seek not only the relief described in that subsection, but also the relief described in § 1964(a). Section 1964(c) then provides a limited right of action for private parties. They read the two clauses of § 1964(c), however, as tightly linked provisions, under which private plaintiffs may sue *only* for monetary damages. The mention of this type of relief in the second clause must mean, the defendants argue, that by implication no other remedies, particularly injunctive remedies, are available. We cannot agree that this is a reasonable reading of the statute.

As an initial matter, we note that the *Wollersheim* decision apparently misreads § 1964(b) when it states that § 1964(b) explicitly "permits *the government* to bring actions for equitable relief." *Wollersheim*, 796 F.2d at 1082. Section 1964(b) does allow the government to seek equitable relief, but it specifically mentions only *interim* remedies. Although no one doubts that permanent injunctions are also available to the government, the government's ability to seek permanent, as opposed to interim, equitable remedies comes from the general grant of authority for district courts to enter injunctions found in § 1964(a), not from anything in § 1964(b). (The sentence "[t]he Attorney General may institute proceedings under this section" is in that respect the equivalent of the first clause in § 1964(c), which says "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any

appropriate United States district court. . . ." Neither one addresses what remedy the plaintiff may seek.) Given that the government's authority to seek injunctions comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a), we see no reason not to conclude, by parity of reasoning, that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c).

In addition, we cannot agree with the defendants' contention that § 1964(a) is a purely "jurisdictional" statute, despite the Ninth Circuit's characterization of it in that way in *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1307 (9th Cir. 1992) (construing *Wollersheim* holding as jurisdictional). What § 1964(a) does is to grant district courts authority to hear RICO claims and then to spell out a non-exclusive list of the remedies district courts are empowered to provide in such cases. In that sense, § 1964(a) is strikingly similar to the statute the Supreme Court construed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). The statute at issue in *Steel Co.* provided that "[t]he district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." *Id.*, quoting 42 U.S.C. § 11046(c). Noting that "'[j]urisdiction' . . . is a word of many, too many, meanings," the Court held that it would be "unreasonable to read [the statute] as making all the elements of the cause of action under subsection (a) jurisdictional, rather than as merely specifying the remedial *powers* of the court, *viz.*, to enforce the violated requirement and to impose civil penalties." *Id.* This part of the *Steel Co.* holding supersedes any rationale to the contrary that the courts of appeals may have followed in earlier years. We find that it is applicable to RICO and that § 1964(a) both confers jurisdiction on the district courts and specifies certain remedial powers that the courts will have in cases brought before them.

Once we accept that § 1964(a) is not purely jurisdictional, but also describes remedies available under RICO, the defendants' position becomes untenable. In the defendants' view, despite the general provisions for equitable relief in § 1964(a), injunctive relief is not available to any particular plaintiff unless it is also provided by some other section of the statute. This reading renders § 1964(a)'s provision for injunctive relief a nullity. Because an alternative reading exists which gives meaning to every section of the statute, see *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) ("courts should disfavor interpretations of statutes that render language superfluous"), we reject the defendants' approach.

The defendants' final textual argument springs from the maxim that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979). While we have no doubt that this is good advice as a general matter, we do not find it particularly helpful in this case. This is not a situation in which Congress has provided for a private damages remedy and has remained silent as to the availability of injunctive relief. Instead, Congress explicitly provided for injunctive relief in § 1964(a), although it did not specify in that section which plaintiffs can seek such relief. Given that the next two sections describe two types of plaintiffs, the government and private plaintiffs, and spell out additional remedies specific to each type, we find that the only logical conclusion is that Congress intended the general remedies explicitly granted in § 1964(a) to be available to all plaintiffs.

Although we would be confident resting our holding purely on the plain text of § 1964, we note that our interpretation is consistent with Congress's admonition that the RICO statute is to be "liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Adhering to this admonition, which "obviously seeks to ensure that Con-

gress' intent is not frustrated by an overly narrow reading of the statute," *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993), the Supreme Court has consistently rejected interpretations by the courts of appeals that would limit the scope of RICO actions in ways not contemplated by the text of the statute. See, *e.g.*, *Cedric Kushner Promotions, Ltd. v. King*, --- U.S. ---, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001) (rejecting argument that employee of corporation acting within scope of employment cannot be a "person" distinct from the corporation); *Salinas v. United States*, 522 U.S. 52, 61-66, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997) (rejecting requirement that conspiracy defendant himself has committed predicate acts); *NOW I*, 510 U.S. at 256-62, 114 S. Ct. 798 (rejecting requirement that enterprise have an economic motive); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (rejecting requirements that defendant has been convicted of predicate act and that plaintiff has suffered a "racketeering injury," as opposed to injury from mere predicate acts); *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) (rejecting argument that RICO enterprise must have legitimate as well as illegitimate aspects). RICO's liberal-construction clause has particular force, as the Supreme Court has stated, when we are construing § 1964, the civil remedy provision, because it is in this section that "RICO's remedial purposes are most evident." *Sedima*, 473 U.S. at 491 n. 10, 105 S. Ct. 3275. In keeping with the spirit of these cases, we decline to restrict the remedies available under RICO, when Congress has provided for broad equitable relief under § 1964(a).

Our interpretation of § 1964 is also in keeping with the underlying purposes of the RICO statute. As the Supreme Court recently noted, Congress in enacting RICO intended to "encourag[e] civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S.

549, 557, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000). Recognizing that the statute gives private citizens the ability to seek injunctive relief as well as damages is fully consistent with this role for civil RICO litigation.

Perhaps realizing that the plain text of the statute strongly suggests that private plaintiffs can seek injunctions, the *Wollersheim* court relied heavily in its decision on two pieces of legislative history. First, the court noted that, during the floor debate on the bill in the House, Representative Steiger, the House sponsor of the bill, introduced an amendment that would have, among other things, made private plaintiffs' right to seek injunctive relief explicit. The amendment was withdrawn after another representative described it on the House floor as creating "an additional civil remedy." See *Wollersheim*, 796 F.2d at 1085-86. Second, the court noted that one year after the bill's passage, Congress failed to pass a bill introduced in the Senate with the same language as the Steiger amendment. See *id.* at 1086. From these two occurrences, the Ninth Circuit concluded that "in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision." *Id.*

Again, with respect, we cannot agree with the Ninth Circuit that these snippets of legislative history amount to the kind of "'clearly expressed legislative intent to the contrary'" that we would require to cast doubt on unambiguous statutory language. *NOW I*, 510 U.S. at 261, 114 S. Ct. 798. Even these excerpts do not unequivocally indicate that Congress intended private plaintiffs to be limited to damages remedies. As the *Wollersheim* decision itself notes, there are indications in the legislative history to the contrary. *Id.* at 1085. More importantly, however, although the *Wollersheim* court may well have made a reasonable decision in 1986 to rely on Congress's refusal to enact amendments to the statute, recent Supreme Court precedent teaches that this type of legislative history is a

particularly thin reed on which to rest the interpretation of a statute. See, *e.g.*, *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169-70, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. A bill can be proposed for any number of reasons, and it can be rejected for just as many others."); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."). Given the Court's reluctance in recent years to rely on the type of legislative history that underpins *Wollersheim*, we cannot agree with the Ninth Circuit's earlier view that this legislative history trumps the otherwise plain language of § 1964.

In a last effort to save their reading of the statute, the defendants urge us that certain differences between the language of RICO and the language of section 4 of the Clayton Act (on which RICO was based) demand the inference that no private right to injunctive relief exists under RICO. The Clayton Act, they note, provides private rights of action in two separate sections: one for damages in § 4, 15 U.S.C. § 15(a), and one for injunctive relief in § 16, 15 U.S.C. § 26. RICO, in contrast, has only one statutory section addressing civil remedies, and the only subsection that specifically talks about private actions mentions only damages. Defendants argue that Congress's failure to include in § 1964(c) language analogous to that in Clayton Act § 16 must mean that it did not intend to allow private parties to seek injunctions.

We reject this line of analysis for a number of reasons. First, the mere fact that the Clayton Act spreads its remedial provisions over a number of different sections of the U.S. Code[1]

---

[1] The remedial provisions of the Clayton Act are actually spread over far

and RICO does not, adds little to our understanding of either statute. More importantly, the Supreme Court regularly treats the remedial sections of RICO and the Clayton Act identically, regardless of superficial differences in language. See, *e.g.*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188-89, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997) (applying Clayton Act rule for accrual of cause of action to RICO); *Holmes v. SIPC*, 503 U.S. 258, 267, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992) (applying proximate cause rule to RICO). Since the Court has already determined that litigants other than the Attorney General may obtain broad injunctive relief under the Clayton Act, see *California v. American Stores Co.*, 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990), cases like *Klehr* and *Holmes* indicate that we ought to adopt the same interpretation with respect to RICO. Indeed, *American Stores* (which came to the Court from the Ninth Circuit) pointedly rejected the way in which the Ninth Circuit had relied on legislative history to limit the Clayton Act's textual grant of private injunctive relief. *Id.* at 285, 110 S. Ct. 1853. This in turn undercut *Wollersheim*, which had used the same methodology as the discredited *American Stores* opinion. For all these reasons, we find that § 1964 authorizes injunctive relief at the behest of both the Attorney General and private plaintiffs, authorizes interim measures when the Attorney General sues, and authorizes private treble damages only for private plaintiffs (and not the United States). The district court thus correctly concluded that RICO authorized the private plaintiffs here to seek injunctive relief.

---

more than the two sections the defendants mention. In addition to §§ 4 and 16, the Clayton Act also includes (as codified) 15 U.S.C. § 15(b) (suits for actual damages brought by foreign governments), 15 U.S.C. § 15a (suits for treble damages brought by the United States for its own injuries to business or property), 15 U.S.C. § 15c (*parens patriae* suits brought by state attorneys general for treble damages on behalf of natural persons in the state), and 15 U.S.C. § 25 (actions for injunctive relief brought by the Attorney General).

III

With this much established, we may turn to the defendants' First Amendment arguments. All parties acknowledge that the defendants engaged in a substantial amount of protected speech during the protest missions and other anti-abortion activities, including picketing on public sidewalks in front of clinics and verbally urging patients not to have abortions. We entirely agree with the defendants that liability cannot constitutionally be imposed on them for this portion of their conduct. But the record is replete with evidence of instances in which their conduct crossed the line from protected speech into illegal acts, including acts of violence, and it is equally clear that the First Amendment does not protect such acts. As is true in many political protest cases, the defendants' protected speech was often closely intertwined with their unprotected illegal conduct. Nevertheless, we believe the district court adequately ensured that the jury's verdict was not based on activities protected by the First Amendment, and that the remedies it ordered also respected the line between protected expression and unprotected conduct.

The defendants' First Amendment arguments fall into two categories. First, they argue broadly that imposing liability on them on the basis of their protest activities violates the First Amendment. Second, they argue that, even assuming they could constitutionally be held liable for their alleged conduct, the jury instructions and verdict form in this case did not contain necessary First Amendment safeguards. Before we reach either of these arguments, we pause to consider the standard of review we should apply in analyzing the defendants' First Amendment claims.

The Supreme Court has repeatedly held that, in cases in which First Amendment concerns are implicated, reviewing courts have an obligation to conduct an "'independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United*

States, Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Although this maxim has been applied most often in cases reviewing the factual findings of lower courts, the Court in *Bose* noted that the rule is equally applicable "whether the factfinding function be performed in the particular case by a jury or by a trial judge." 466 U.S. at 501, 104 S. Ct. 1949. Citing this rule, the defendants urge that our review of their First Amendment challenges must be plenary.

As we have noted before, however, even though *Bose* calls for an "independent examination of the whole record," it is not entirely clear what this "plenary" review is supposed to entail. See *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987). In particular, it is not clear whether *Bose* requires an independent review only of the ultimate factual conclusion that the defendants' conduct fell outside the protection of the First Amendment, or whether this court is required to conduct a more searching review of "findings of underlying facts, evaluations of credibility, and the drawing of inferences." *Brown & Williamson*, 827 F.2d at 1128. In cases in which we are reviewing a jury verdict rather than the findings of a lower court, the question is even more complex, because we must somehow reconcile the defendants' First Amendment rights against the command of the Seventh Amendment that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. *Bose* itself involved review of facts found by the district court under Fed. R. Civ. P. 52(a), and thus the Court had no occasion to consider this problem. For a different reason, we conclude that it is not necessary here to decide whether or not a broader version of the re-examination of jury findings is permissible when First Amendment rights are at issue. Even assuming that the *Bose dicta* requires us to conduct a plenary review of all of the factual findings relevant to the First Amendment issues before us (which is the most favorable position we can take for

the defendants), we find that the jury's determinations are fully supported by the record.

A.

Protection of politically controversial speech is at the core of the First Amendment, and no one disputes that the defendants' speech labeling abortion as murder, urging the clinics to get out of the abortion business, and urging clinic patients not to seek abortions is fully protected by the First Amendment. See, *e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993). It is equally clear, however, that the First Amendment does not protect violent conduct, *Wisconsin v. Mitchell*, 508 U.S. 476, 484, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), nor does it protect threats, *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 773, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994), or language used to carry out illegal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949). Even when a defendant's conduct involves expressive elements, the government is free to regulate the non-expressive aspects of the conduct if such regulation is necessary to serve important government interests. *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). The protection of the plaintiffs' rights to seek and provide medical care free from violence, intimidation, and harassment is such an important government interest. See, e.g., *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 376, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997); *Madsen*, *supra*, 512 U.S. at 768, 114 S. Ct. 2516. As the Supreme Court has explained, "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts v. United States Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

In this case, the plaintiffs presented ample evidence that the individual defendants and others associated with PLAN engaged in illegal conduct that directly threatened an important governmental interest. The evidence presented at trial showed

that, at PLAN-sponsored events, protesters trespassed on clinic property and blocked access to clinics with their bodies, including at times chaining themselves in the doorways of clinics or to operating tables. At other times, protesters destroyed clinic property, including putting glue in clinic door locks and destroying medical equipment used to perform abortions. On still other occasions, protesters physically assaulted clinic staff and patients. In addition, defendant Scheidler, on behalf of defendants PLAL and PLAN, sent letters to class clinics threatening that they would be subjected to similar attacks if they did not cease performing abortions. In light of the protesters' conduct at other PLAN events, the district court correctly concluded that these letters were not protected political speech but constituted true threats outside the protection of the First Amendment.

Assuming that the defendants can be held liable for these incidents, all of which occurred under PLAN sponsorship, then the plaintiffs produced ample evidence of illegal conduct that may legitimately be regulated given the importance of the governmental interest in protecting the right to seek and provide medical care. In a case where a similarly important governmental interest is not present and the conduct in question has an expressive element, we do not disagree with the defendants that the First Amendment might well shield that particular conduct from being used as the basis for RICO liability. (We express this thought cautiously only because the balance between the strength of the government's interest and the degree to which conduct has an expressive element will vary from case to case.) In any event, this case presents no such problems. We are satisfied that the record here easily supports the jury's finding of liability.

At this point, the defendants shift their argument to a more personal one: maybe someone associated with PLAN was engaged in unprotected conduct, but the evidence did not establish that the defendants themselves were involved, as opposed to being involved exclusively in PLAN's protected

speech activities. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), the Supreme Court noted that, where an organization engages in both protected speech and unprotected, illegal conduct, the First Amendment does not permit individuals to be held liable for the organization's illegal acts merely based on their association with the organization. *Id.* at 908-09, 102 S. Ct. 3409. Rather, in order to impose liability on an individual based on that individual's association with an organization, a plaintiff must show both that the organization itself, rather than just isolated members, possessed unlawful goals and that the individual defendant held a specific intent to further those illegal aims. *Id.* at 920, 102 S. Ct. 3409.

We agree that *Claiborne Hardware* is directly applicable to our case. Although the plaintiffs established that the individual defendants themselves participated in many of the incidents described during the trial, the plaintiffs also introduced evidence of many other incidents coordinated or orchestrated by PLAN for which they did not specifically show that the individual defendants themselves committed the illegal acts described. In order for the defendants to be held responsible for acts committed by other members of PLAN during PLAN-organized events, *Claiborne Hardware* required the plaintiffs to show that PLAN itself, and not merely isolated members, intended that the illegal acts occur, that the defendants were aware of PLAN's illegal aims, and that the defendants held a specific intent to further those aims through their association with PLAN.

Even though this is an exacting test, once again the record shows that the plaintiffs satisfied it in this case. All of the individual defendants who remain in the case were on the board of directors of PLAL. PLAL and Operation Rescue, the two remaining organizational defendants, were in turn the primary organizers of PLAN. The plaintiffs put into evidence numerous letters, newsletters, and other publications authored by defendant Joseph Scheidler, executive director of PLAL, and by Randall Terry, executive director of Operation Rescue, detailing

the activities planned for upcoming PLAN events. The activities detailed in these letters included blocking access to clinics and entering clinics to block passageways. As noted above, these types of protest activities are illegal conduct unprotected by the First Amendment. Similarly, the threatening letters to plaintiff clinics were sent on PLAL letterhead, signed by Scheidler, and specifically described the threat as coming from PLAN. The jury was entitled to conclude from this evidence that PLAN itself, not merely isolated members, held illegal aims.

It is also significant that all of the individual defendants were high-level leaders within PLAN, and as such they knew of PLAN's illegal aims and intended to further those aims. The record showed that defendant Scheidler personally organized and coordinated many of PLAN's activities. Defendants Scholberg and Murphy also participated in planning meetings for PLAN events at which illegal blockades were to take place and spoke at PLAN conventions designed to train protesters in the use of these tactics. The plaintiffs presented more than enough evidence to convince us that the individual defendants actively intended to further PLAN's illegal goals.

B.

Turning to the defendants' narrower First Amendment argument, the defendants contend that, regardless of whether there was sufficient evidence from which the jury could have found that they engaged in unprotected activities, the jury instructions and verdict form used by the trial court allowed the jury to find the defendants liable based solely on the defendants' protected speech. The verdict form that the district court used asked the following relevant questions:

> 1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?

2. Were the . . . defendants associated with PLAN? (See Jury Instruction No. 20 for the definition of "associated with.")

. . .

4. Did any Defendant, or any other person associated with PLAN, commit any of the [alleged predicate acts]?

The jury instruction to which the verdict form referred stated, in relevant part:

Jury Instruction No. 20: Plaintiffs must show that the defendant was "associated with" PLAN. That is, the defendant must have had some minimal association with PLAN and have known something about PLAN's activities as they relate to the illegal acts under RICO. It is not necessary that the particular defendant committed acts unlawful under RICO or was aware of all of the unlawful acts committed by the other people who were associated with PLAN. . . .

In the district court, the defendants objected to these instructions, arguing that they did not require the jury to find that the defendants harbored a specific intent to further PLAN's illegal aims, as required by *Claiborne Hardware*. The district court apparently agreed, because it added an additional jury instruction which stated:

Jury Instruction No. 30--Defendants' Liability for Acts of Others: Liability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence. In order to find the defendants liable, you must conclude that the enterprise, or those acting on behalf of the enterprise, directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives.

The defendants did not renew their objection to the jury instructions after the district court made this change. Nevertheless, in this court, the defendants have argued that, even with the additional instruction, the jury instructions did not

adequately protect their First Amendment rights, because the Claiborne Hardware standard was incorporated only into the jury instructions, not into the verdict form.

Initially, we note that by not renewing their objection to the jury instructions and verdict form after the district court added Instruction 30, the defendants at least implied that they were satisfied with the court's resolution of their objection. Accordingly, we are inclined to find that the defendants have waived any objection to those instructions on appeal. See *United States v. Jones*, 224 F.3d 621, 626 (7th Cir. 2000) (objection to jury instruction waived where defense counsel agreed to instruction at trial). Because this is a civil trial, not a criminal trial, there is no equivalent of "plain error" review for a challenge that is forfeited rather than waived. In the interest of absolute fairness, however, we will consider this point based on the earlier objections.

Our review of jury instructions is deferential, and we consider only whether the instructions, taken as a whole, adequately informed the jury of the applicable law. *Molnar v. Booth*, 229 F.3d 593, 602 (7th Cir. 2000). We are confident that these instructions did so. This jury could not have found the defendants liable without finding that the defendants themselves specifically intended to further PLAN's illegal aims. Jury Instruction 30 made this requirement explicit, and absent any indication to the contrary, we presume that jurors follow the instructions they are given. *Miksis v. Howard*, 106 F.3d 754, 763 (7th Cir. 1997). There is no requirement for a district judge to replicate every instruction on the verdict form itself. We are confident that the jurors followed their instructions, heeded Instruction 30 when they considered the questions on the special verdict form, and that nothing on the form misled or confused them or caused them to ignore their instructions.

IV

The last serious contention we must address is the defendants' argument that the injunction in this case is vague

and overbroad. The operative portion of the injunction reads as follows:

> Defendants . . . and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly:
>
> a. interfering with the right of any member of the Certified Class of Plaintiff Clinics to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of women to avail herself of the Plaintiff Clinics' services (including but not limited to abortion services), by:
>
> (1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic;
>
> (2) trespassing on the premises or the private property of any Plaintiff Clinic;
>
> (3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic;
>
> (4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic;
>
> b. aiding, abetting, inducing, directing, or inciting any of the acts enumerated in subsection a. of this paragraph (the "Acts") through any of the Defendants or through others; or
>
> c. Operating an enterprise through any of the Acts described above.
>
> This injunction does not prohibit or preclude activities that are constitutionally protected, including but not limited to the following conduct:

a. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic;

b. Making speeches on public property;

c. Speaking to individuals approaching the clinic;

d. Handing out literature on public property; and

e. Praying on public property.

This injunction shall bind Defendants . . . and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN.

The defendants raise two principal objections to the scope of the injunction. First, they complain that it contains a number of terms that are vague or indefinite, and that as such, it is likely to chill a substantial amount of protected speech. Second, the defendants charge that the injunction makes them liable for the conduct of persons they do not control and for actions they do not authorize or approve. We consider each of these contentions in turn.

First, we recognize that it is a delicate task to craft an injunction that prohibits illegal conduct when that conduct is closely tied to political protests and other protected activity. The court must tread carefully to avoid hampering protected speech. Here, we do not disagree with the proposition that some language in this injunction, taken in the abstract, is rather general. But the key question is: Compared to what? Any effort to deal with a case of this complexity will inevitably involve some imprecision. Many criminal statutes contain key terms such as the word "material" which are somewhat imprecise but have never been considered void for vagueness. The defendants in this case never proposed any alternative language for an injunction, despite several invitations from the district court to do just that, so the real question is whether the injunction the court entered is as precise as possible while still ensuring that the defendants' illegal activities are enjoined.

We are satisfied that the injunction drafted by the district court here has struck the proper balance and has avoided any risk of curtailing protected activities. By its terms, the injunction prohibits only illegal conduct – trespassing, obstructing access to clinics, damaging property, using violence or threats of violence, or aiding, abetting, inducing, directing, or inciting any of these acts. We do not find any ambiguity in the terms the district court used to describe the prohibited conduct, and as discussed above, none of this conduct is protected by the First Amendment.

Although we do not believe that the terms of the injunction would reach protected speech in any case, the injunction itself includes an additional safeguard. A specific provision underscores that it does not prohibit peaceful picketing, speeches, or praying on public property, attempts to speak with patients and staff, handing out literature, or any other activity protected by the First Amendment. Given this explicit language, there can be no doubt that this injunction reaches only unprotected, illegal conduct, not protected speech. The defendants' alarmist prediction that, under the terms of the injunction, a protester who engages in "months of peaceful picketing" and then takes "two accidental footsteps onto private property" could be subject to contempt proceedings not only for trespass but also for the picketing is pure fancy and bears no relation to the actual wording of the injunction.

Nor do we find that the injunction impermissibly holds the defendants responsible for the actions of persons beyond their control. The injunction applies only to the defendants and to persons working in "active concert" with the defendants or in concert with PLAN. For that reason alone, the injunction's sweep is not so broad as the defendants suggest. Activists and protesters not closely associated with the defendants or with PLAN, an organization the defendants control, are not affected by the injunction. (This takes care of the specter of renegades who, the defendants assert, are utterly beyond their control.) Moreover, to the extent the injunction reaches the conduct of

individuals not named in this lawsuit, the order enjoins those individuals from violating its mandates. If individuals acting in concert with the defendants or PLAN violate the injunction, without inducement or direction by the defendants, the violators, not the defendants, would be in contempt of the court's order. Nothing in the order purports to hold the defendants liable for actions they do not direct, incite, or control.

The injunction as it is written is narrowly tailored to prohibit the specific types of illegal conduct that the defendants have engaged in on past protest missions. As such, it does not threaten the defendants' First Amendment rights. We are confident that the district court will take as much care in enforcing the injunction as it plainly took in crafting it. Indeed, with its explicit protection of peaceful picketing, speech, literature, and prayer, perhaps in the end the injunction may further rational discourse on one of the most volatile political controversies facing the nation today. Violence in any form is the antithesis of reasoned discussion. By directing those with passionate views about the abortion controversy – on either side – away from the use of threats and violence and back to "all the peaceful means for gaining access to the mind," the injunction the district court issued is in harmony with the fundamental First Amendment protection of free speech.

V

The defendants have raised a hodgepodge of other challenges to the judgment, none of which need detain us long. First, the defendants point out that in the plaintiffs' First and Second Amended Complaints (which were filed before the first set of appeals in the case) only the clinic plaintiffs alleged RICO claims; NOW joined only the counts alleging antitrust violations. As noted above, when the Supreme Court granted certiorari to review our earlier decision in this case, that grant was limited to questions concerning the RICO counts. The antitrust claims fell out of the case after the Court declined to review our decision with respect to them. According to the defendants, once all the counts to which NOW was a party fell

out of the case, the effect was the same as a final judgment against NOW, and *res judicata* barred the plaintiffs from amending their complaint to include NOW as a plaintiff in the RICO counts. The district court, however, permitted the plaintiffs to file a Third Amended Complaint, after remand from this court, which included NOW as a plaintiff in the RICO counts.

Whether to allow amendments to a complaint is a question committed to the discretion of the trial court. *Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001). Contrary to the defendants' assertion, there was no final judgment in this case after the Supreme Court's decision to which *res judicata* principles could apply. The case was still pending, first in this court and then in the district court. As a general rule, amendments to complaints are liberally allowed up to and even after trial, judgment, and appeal. See *United States v. Security Pac. Bus. Credit, Inc.*, 956 F.2d 703, 707-08 (7th Cir. 1992); see also *Guse v. J.C. Penney Co.*, 570 F.2d 679, 680 (7th Cir. 1978) (even after plaintiff lost on appeal, there was no final judgment against plaintiff, and district court was free to allow plaintiff to file amended complaint putting forth new legal theory). The Supreme Court made it clear in its opinion that it was evaluating the complaint only on the pleadings, see 510 U.S. at 256, 262, 114 S. Ct. 798, which is the most preliminary stage of proceedings one can imagine. The district court was thus well within its discretion in allowing NOW to continue as a plaintiff for the RICO claims in the Third Amended Complaint.

The defendants also argue that the clinics' claims are barred by *res judicata*. While this case was pending, one of the plaintiff clinics, Summit Women's Health Organization, filed suit in state court in Wisconsin seeking an injunction against Scheidler and several other defendants to prevent PLAN from engaging in illegal blockades during a PLAN convention in Milwaukee. The Wisconsin courts ultimately dismissed that lawsuit without prejudice as to most of the defendants.

However, before the case was dismissed, Scheidler and the Summit Women's Health Organization entered into a settlement agreement that specified that "all claims against [Scheidler] relating to conduct which occurred prior to the signing of this stipulation are hereby dismissed as to [Summit] with prejudice." The defendants argue that, because the claims that Summit raises in this case had already accrued at the time Summit entered into this stipulation, Summit is barred from bringing these claims in this lawsuit.

We need not consider what preclusive effect the Wisconsin settlement might have, because the defendants waived this issue in the district court. *Res judicata* is an affirmative defense that is waived if a party does not plead it. Fed. R. Civ. P. 8(c). Under the local rules of the Northern District of Illinois, the defendants were required to list all their defenses in their trial brief, and any defenses not listed were waived. The defendants admit that they did not list *res judicata* based on the Wisconsin litigation as an affirmative defense in their trial brief, and accordingly they have lost the opportunity to argue that issue here. Although we find that this claim is waived, we also note that, even if it were not waived and if the Wisconsin settlement had a preclusive effect in this case, the preclusion could run only between Summit and Scheidler and would not affect any of the other plaintiffs, including the class members, or any of the other defendants. The injunction would not be affected, all of the defendants would remain jointly liable for the damages to Delaware Women's Health Organization, and all of the defendants except Scheidler would remain liable to Summit. The practical effect of any preclusion would therefore be negligible.

The defendants have also urged this court to decertify the two classes, arguing that NOW and the named clinics are inadequate class representatives. The defendants particularly object to the district court's decision to include in the NOW class women who are not members of NOW, arguing that because NOW is a partisan advocacy group and the issues

involved in this case concern a matter of great social controversy, NOW is likely to have interests antagonistic to the views of some members of the class. Class certification decisions are committed to the discretion of the district court, however, see *Chavez v. Illinois State Police*, 251 F.3d 612, 629 (7th Cir. 2001), and we find that the district court's decision to certify the two classes here was well within the court's discretion. It is inaccurate in any event to imply that the district court certified a class of "all women." The court did no such thing. Instead, it certified a class that included only those women, whether or not members of NOW, whose right to seek abortion services has been or will be interfered with by the defendants. In order for these women's interests to be antagonistic to the claims NOW is bringing, the defendants would have to argue that at least some women in the class want to seek abortion services, but do not want to be free from harassment and intimidation while doing so. This scenario strikes us as exceedingly unlikely; at the very least, we agree with the district court that it "is clearly speculative and projects personally held views onto the plaintiff class." *National Organization for Women, Inc. v. Scheidler*, 172 F.R.D. 351, 362 (N.D. Ill. 1997).

As to the defendants' more general arguments that the named plaintiffs have not performed adequately as class representatives, we note that the named plaintiffs have pursued this litigation diligently for fifteen years, through a trip to the Supreme Court of the United States and a seven-week trial, and ultimately were successful in securing a nationwide injunction against the defendants prohibiting the conduct they set out to challenge. Given this record of performance, we cannot say that the district court in any way abused its discretion in certifying these classes.

The defendants have also argued that the conduct in which they engaged is not prohibited by RICO for a number of reasons. First, the plaintiffs alleged as predicate acts numerous violations of the federal extortion statute, the Hobbs Act, 18

U.S.C. § 1951, and the defendants argue that the Hobbs Act does not apply to their conduct. The defendants' primary contention on this point is that the Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," and that the things the plaintiffs claim were taken here – the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses – cannot be considered "property" for purposes of the Hobbs Act. However, this circuit has repeatedly held that intangible property such as the right to conduct a business can be considered "property" under the Hobbs Act, see, *e.g., United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983), and we will not revisit that holding here.

In a similar vein, the defendants assert that, even if "property" was involved, the defendants did not "obtain" that property; they merely forced the plaintiffs to part with it. Again, this argument is contrary to a long line of precedent in this circuit holding that "as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *United States v. Stillo,* 57 F.3d 553, 559 (7th Cir. 1995).

In addition to their challenges to the application of the Hobbs Act, the defendants argue that the district court erred in giving the jury a generic instruction describing the elements of the state law extortion offenses the plaintiffs alleged as additional predicate acts. According to the defendants, there are substantial differences in the extortion laws of the states in which these alleged predicate acts occurred, and the district court's attempt to cover all the relevant state laws with a single, generic instruction impermissibly discounted these differences. Without expressing an opinion on whether this approach was permissible, we simply note that, if any error occurred, it was harmless. The jury found that the defendants committed 21

predicate acts under the Hobbs Act alone, which is far in excess of the two predicate acts that RICO requires. In the face of this finding, any error in the state extortion law instructions, which could at most have affected the jury's decision on the additional state-law predicate acts it found, could not have had any effect on the outcome of this case.

Finally, while this appeal was pending, the defendants filed motions in the district court seeking relief from the judgment under Rules 60(b)(2) and (3). The district court denied the motions, and the defendants appealed. We consolidated that appeal with this case and suspended briefing on the 60(b) issues. We have reviewed the defendants' motions in the trial court and the trial court's resolution of those issues, and we conclude that no further briefing on the issues is necessary.

"Rule 60(b) relief is an extraordinary remedy granted only in exceptional circumstances." *Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000). Our review of the district court's decision denying relief is deferential, and we will reverse only if the district court has abused its discretion. *J & W Fence Supply Co. v. United States*, 230 F.3d 896, 898 (7th Cir. 2000). We find no abuse of discretion in this case. In their 60(b) motions, the defendants argued that they had newly discovered evidence relating to two specific incidents described by witnesses during the trial. In addition, the defendants posited that newly discovered evidence called into doubt whether an anonymous witness who testified at the trial in fact needed to remain anonymous. The district court denied the motions on the grounds that the defendants had documents in their possession from which they could have discovered most of the "new" evidence for well over a decade, and that relief at this late date accordingly was not warranted. In addition, the court noted that it was very unlikely that any of the "new" evidence, if admitted at trial, would have had any impact on the jury's verdict. Given that Rule 60 motions cannot be used to present evidence that with due diligence could have been introduced before judgment, *Rutledge*, 230 F.3d at 1052, or to put forth evidence that is not

material or that would likely not change the result at trial, *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 732 (7th Cir. 1999), we find no error in the district court's denial of relief.

We have considered all of the defendants' remaining contentions, but find none that requires comment. For the foregoing reasons, the judgment of the district court is AFFIRMED in all respects.

APPENDIX D

United States District Court,
N.D. Illinois,
Eastern Division.

NATIONAL ORGANIZATION FOR WOMEN, INC., and its women members and other women who use or may use the services of women's health centers that provide abortions; Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on behalf of themselves and all other similarly-situated clinics, Plaintiffs,

v.

Joseph M. SCHEIDLER; Pro-Life Action League, Inc.; Randall A. Terry; Andrew Scholberg; Conrad Wojnar; Timothy Murphy; Monica Migliorino; Vital-Med Laboratories, Inc.; Project Life; and Operation Rescue, Defendants.

No. 86 C 7888.
July 25, 1995.

MEMORANDUM OPINION AND ORDER

COAR, District Judge.

Background

This nine-year-old case has a long and convoluted history, portions of which must be reviewed in order to understand the issues before the court. For a more detailed exposition of the facts and procedural history of this case, please refer to *NOW v. Scheidler*, 508 U.S. 971, 113 S. Ct. 2958, 125 L. Ed. 2d 659 (1993).

In 1986, plaintiffs National Organization for Women ("NOW"), and two women's health centers brought this action against various anti-abortion activists, anti-abortion

organizations, and a pathology testing laboratory. They alleged that defendants conspired to drive out of business health centers that provide abortion services. Plaintiffs contended that defendants committed extortion, engaged in physical and verbal intimidation, destroyed property, orchestrated phone campaigns to tie up clinic phone lines, made false appointments at the clinics, and disrupted the clinics' relationship with their landlords – all in violation of the Sherman Antitrust Act and sections 1962(a), (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiffs also raised several pendent state claims.

On May 28, 1991, the district court dismissed the Second Amended Complaint. *NOW v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991). The court held the Sherman Act inapplicable to the conduct alleged in the complaint because defendants' conduct was incidental to a valid effort to influence governmental action and therefore immune. The court dismissed the § 1962(a) RICO claim because defendants' receipt of donations from supporters was not income derived from racketeering. The § 1962(c) RICO claim was dismissed because the court concluded that RICO requires that economic motive be alleged. The RICO conspiracy count was dismissed because all substantive RICO counts failed. The state law claims were also dismissed because the dismissal of the claims based on federal law destroyed the basis for jurisdiction over the state law claims. The plaintiffs appealed.

On June 29, 1992, the Court of Appeals for the Seventh Circuit affirmed the district court's dismissal. *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992). The plaintiffs sought and obtained a writ of certiorari from the United States Supreme Court limited to the question of whether a RICO violation required motivation by an economic purpose. *NOW v. Scheidler*, 508 U.S. 971, 113 S. Ct. 2958, 125 L. Ed. 2d 659 (1993).

On January 24, 1994, the Supreme Court reversed. *NOW v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 127 L. Ed. 2d 99

(1994). The Court held that RICO does not require proof that either the alleged racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. In a concurring opinion, Justice Souter emphasized that although the First Amendment does not require reading an economic motive into the unambiguous RICO statute, legitimate free speech issues may be implicated in this case. Justice Souter advised that those concerns should be addressed as they arise. The defendants petitioned for a rehearing, which was denied on March 21, 1994. *NOW v. Scheidler*, 510 U.S. 1215, 114 S. Ct. 1340, 127 L. Ed. 2d 688 (1994).

On October 3, 1994, in an unpublished opinion, the Seventh Circuit recapitulated the Supreme Court's opinion. The Court of Appeals directed the district court to address the issue of whether the predicate acts alleged in the complaint in fact violated the Hobbs Act (18 U.S.C. § 1951). The court specifically reaffirmed its original dismissal of the Sherman Act count and RICO § 1962(a). The court further stated:

> The Supreme Court's decision reinstated count 3 (RICO § 1962(c)) and count 4 (RICO § 1962(d)). Counts five, six, and seven, which allege violations of state law, survive as well pursuant to the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367.
>
> Also on remand, if necessary, the district court should consider which of the defendants' activities, as alleged, are protected by the First Amendment to the United States Constitution. *See Scheidler*, 510 U.S. at --- n. 6, 114 S. Ct. at 806 n. 6. As Justice Souter pointed out in his concurring opinion, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Id.* at ---, 114 S. Ct. at 807 (Souter, J., concurring). This includes Hobbs Act extortion – the sole RICO predicate act alleged by plaintiffs in both their complaint and their RICO Case Statement.

NOW v. Scheidler, 25 F.3d 1053, 1994 WL 196761 (7th Cir. 1994). The case was remanded to the district court for further proceedings.

Before the district court could comply with the mandate of the Court of Appeals, the plaintiffs filed a motion for leave to file a third amended complaint. On October 21, 1994, Judge Holderman granted plaintiffs' motion and ordered plaintiffs to file an updated RICO case statement (Tr. p. 31). The Third Amended Complaint (hereinafter the "Complaint") has four counts.

Count I of the Complaint is brought by all plaintiffs[1] and alleges violations against all defendants except Vital-Med Laboratories, Inc. ("Vital-Med").[2] Count I also alleges that the defendants violated RICO by participating in the Pro-Life Action Network ("PLAN"), which the plaintiffs allege is an enterprise as defined by 18 U.S.C. § 1961(4). Several distinct predicate acts are alleged under count I. These acts include attempted arson, murder, and various Hobbs Act violations. Count II of the Complaint alleges that all defendants except Vital-Med conspired to violate the RICO Act. Count III is brought by DWHO and Summit and alleges that defendants Scheidler, Scholberg, Murphy, Migliorino, Wojnar, and PLAL tortiously interfered with the plaintiffs' prospective economic advantage. Count IV is brought by Summit alone and alleges that defendant Migliorino tortiously interfered with an existing business relationship between Summit and Summit's

---

[1] The plaintiffs in this action are: NOW, on behalf of itself and its members and others who use or may use the services of women's health centers that provide abortions, the Delaware Women's Health Organization, Inc. ("DWHO"), and Summit Women's Health Organization, Inc. ("Summit"), on behalf of themselves and similarly situated clinics.

[2] The other defendants in this action are Joseph Scheidler ("Scheidler"), the Pro-Life Action League ("PLAL"), Randall Terry ("Terry"), Andrew Scholberg ("Scholberg"), Conrad Wojnar ("Wojnar"), Timothy Murphy ("Murphy"), Monica Migliorino ("Migliorino"), Project Life, and Operation Rescue.

prospective lessor. Count V is brought by DWHO and Summit against only Vital- Med for breach of duty of confidentially.

This case was transferred to the undersigned by Executive Order dated November 8, 1994. On February 7, 1995, this court denied several sanctions motions and motions to reconsider the grant of leave to file a Third Amended Complaint. *NOW v. Scheidler*, 1995 WL 59228 (N.D. Ill. 1995).

Defendants now move to dismiss the Third Amended Complaint. [Docket numbers 768, 774, 776, 784, 787]. All motions are fully briefed and ripe for decision. Although the Defendants have filed separate motions and replies, the motions raise similar, though not identical, issues. To the extent possible, the court will address the various Defendants' arguments together. However, several of the arguments do not lend themselves to one coherent treatment.[3]

I. Res Judicata

Defendants make two res judicata arguments. First, they allege that NOW is barred from being a plaintiff under the Third Amended Complaint because it suffered a final dismissal of its claims under the Second Amended Complaint. Second, Wojnar argues that he has obtained a final dismissal of all claims alleged against him and, therefore, res judicata should protect him from having to further defend himself in this litigation.

Res judicata is a judicial doctrine designed to ensure the finality of judicial decisions. *Brown v. Felsen*, 442 U.S. 127,

---

[3] It appears that the Defendants have taken advantage of their status as co-defendants and allowed one group of defendants to "carry the torch" on each individual argument thereby saving the co-defendants' limited 15-page brief space for other arguments. To the extent possible, the court will identify the parties who concur or adopt their co- defendants' positions. However, this type identification is difficult, as some defendants have endorsed their co-defendants' arguments with a single sentence. The court has addressed all meritorious arguments made by the parties, and identifies the individual defendant proponents merely to ease the task of those who will undoubtedly review the record in the future.

131, 99 S. Ct. 2205, 2209, 60 L. Ed. 2d 767 (1979); *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). It is a "rule of fundamental and substantial justice," *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S. Ct. 506, 507, 61 L. Ed. 1148 (1917); *Car Carriers*, 789 F.2d at 593, whose enforcement is essential to the maintenance of social order, "for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if . . . conclusiveness did not attend the judgments of such tribunals." *Alexander v. Chicago Park District*, 773 F.2d 850, 853 (7th Cir. 1985) (*quoting Nevada v. United States*, 463 U.S. 110, 129, 103 S. Ct. 2906, 2917-18, 77 L. Ed. 2d 509 (1983)).

Res judicata, also called claim preclusion, bars the same parties or their privies from relitigating any issue that was raised in a prior judgment or could have been raised in the prior action. *Alexander*, 773 F.2d at 853; *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981); *see* Jack Friedenthal, Mary Kay Kane, Arthur Miller, *Civil Procedure* 610 (1993). As the Court of Appeals explained in *Alexander*:

> Preclusion occurs under two theories: issue preclusion and claim preclusion. Claim preclusion bars relitigation of claims or issues which were or could have been raised in a prior suit on the merits between the same parties or their privies. Plaintiffs' claims are merged in the judgment for plaintiff while judgment for defendants acts to bar any further claims by plaintiff against the defendant. It is usually referred to as res judicata. . . . Issue preclusion prevents relitigation of a matter of fact of law that was previously litigated and decided. *See Jones v. City of Alton*, 757 F.2d 878, 879 n. 1 (7th Cir. 1985). It is usually referred to as collateral estoppel.

Alexander, 773 F.2d at 853.

Res judicata promotes accuracy (leaving in place properly decided cases), efficiency ("it is in the interest of the state that there be an end to litigation"), and fairness ("no person should

be twice vexed by the same claim"). Friedenthal, *et al.*, *Civil Procedure* 617 (1993), *see* Robert Ziff, Note, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 Cornell L. Rev. 905, 910 (1992).

A. Legal Standard for Res Judicata

There are three threshold requirements to be considered in applying res judicata: (1) identity of the parties or their privies; (2) identity of the causes of action; and (3) a final judgment on the merits. *Car Carriers*, 789 F.2d at 595 n. 9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). A court must find each of these threshold requirements in order to apply res judicata as a bar.

The doctrine of res judicata is generally applied to a single "cause of action." The Court of Appeals in this circuit employs the "same transaction" test to define a "cause of action." *Car Carriers*, 789 F.2d at 593; *Alexander*, 773 F.2d at 854; *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1241 (7th Cir. 1983). Under the same transaction test, a "cause of action" consists of a " 'single core of operative facts' which would give rise to a remedy." *Car Carriers*, 789 F.2d at 593 (quoting *Alexander*, 773 F.2d at 854). The "same transaction" test is fact-oriented, and provides that once a transaction has caused injury, all claims arising from that transaction must be brought in the same suit or be lost. *Car Carriers*, 789 F.2d at 593.

B. Applicability of Res Judicata to the Parties

1. NOW

Defendants Terry, Project Life, and Operation Rescue (hereinafter the "Terry Defendants") and Defendants Scheidler, Scholberg, Murphy, and PLAL (hereinafter the "Scheidler Defendants") argue that res judicata bars NOW, and only NOW, from bringing RICO claims against them. The Terry Defendants argue that NOW suffered a final, undisturbed judgment when the Second Amended Complaint was dismissed. They argue that in the Second Amended Complaint, NOW

claimed injury only under the Sherman Act and that the dismissal of the Sherman Act claims was undisturbed by the Supreme Court. Accordingly, the Terry Defendants claim that res judicata bars NOW from asserting a new claim arising from the same set of operative facts after a final decision on the merits of the original claim. Thus, they argue, under the "same transaction" test, NOW should be precluded from prosecuting the Third Amended Complaint.

The plaintiffs argue that NOW did allege RICO claims in the Second Amended Complaint, and that those claims remain viable after the Supreme Court's reversal of the prior orders of dismissal. Thus, the first task is to determine whether NOW was a plaintiff as to the RICO counts in the Second Amended Complaint. If the answer is yes and those counts were revived by the decision of the Supreme Court, res judicata is not applicable because there has been no final decision on the merits. This determination is made difficult by the fact that not every named plaintiff made claims against every named defendant in the Second Amended Complaint.

Before turning to the specific language relied upon by the parties, a description of the layout of the Second Amended Complaint is helpful. Paragraphs one through three are contained in a subsection of the complaint titled "NATURE OF THE ACTION." Paragraph four deals with jurisdiction. Paragraphs five through eight are captioned "PLAINTIFFS." Paragraphs nine through twenty appear under a "DEFENDANTS" heading. Paragraphs twenty-one through thirty-seven describe "CLASS ALLEGATIONS." Paragraphs thirty-eight through fifty-five are captioned "FORMATION OF THE PRO-LIFE ACTION NETWORK." Paragraphs fifty-six through sixty-three explain the "CARRYING OUT OF PLAN'S AGENDA: OPERATION RESCUE." Paragraphs sixty-four through seventy-eight appear under a "THEFT OF FETAL REMAINS" caption. Paragraph seventy-nine is the beginning of the actual substantive counts of the complaint; each count realleging the facts contained in the previous paragraphs. Over

half the allegations in the complaint are not contained within a "count." This makes interpretation of the complaint difficult because, as will become clear, the complaint contains both specific allegations brought by specific defendants *as well as* general allegations which, read alone, do not always make clear which plaintiff is making the assertion.

In the first paragraphs under the RICO counts subheadings (counts II, III, and IV) the Second Amended Complaint states that the counts were brought by "plaintiffs DWHO and Summit and the class they represent." (Second Am. Compl. §§ 94,[4] 106,[5] 111[6]). NOW takes the position that paragraphs one, three, twenty-two, 105, and 110 of the Second Amended Complaint support its conclusion that it was a RICO plaintiff in the Second Amended Complaint.

---

[4] Paragraph 94 alleges:

> Count II is brought against the defendants Scheidler, Terry, Scholberg, Murphy, PLAL, OR, and the Project (the "RICO Defendants") by plaintiffs DWHO and Summit and the class they represent, which reallege paragraphs 1 through 78.

[5] Paragraph 106 provides:

> Count II is brought against the RICO Defendants and defendant Migliorino by plaintiffs DWHO and Summit and the class of clinics they represent, which reallege paragraphs 1 through 78, and 95 through 105.

[6] Paragraph 111 alleges:

> Count IV is brought against the RICO defendants by plaintiffs DWHO and Summit and the class of clinics which they represent, which reallege paragraphs 1 through 78, 95 through 105, and 107 through 110 above.

Paragraph one[7] outlines the law to be used to justify the relief sought: to obtain declaratory and injunctive relief. Paragraph one thus logically encompasses both the alleged RICO violations and the alleged Sherman Act violations (because both such allegations are made later in the complaint under specific counts) by stating "this is a civil action pursuant to . . . the Sherman Antitrust Act . . . [and] . . . RICO." Thus, paragraph one *does* identify NOW as a plaintiff, but not *necessarily* as a RICO plaintiff.

Paragraph three[8] is no more enlightening. This paragraph does not identify which count it refers to and does no more than explain that NOW believed it had organizational standing to sue under the Sherman Act (see *infra*). Nothing in the paragraph could be logically construed to support plaintiffs' allegation that NOW was a RICO plaintiff.

---

[7] Paragraph one provides:

> This is a civil action pursuant to section 16 of the Clayton Act, 15 U.S.C. Section 26, and section one of the Sherman Antitrust Act, 15 U.S.C. Section 1; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1962; and state law. Plaintiffs seek declaratory and injunctive relief and damages from defendants who have conspired, among themselves and with others to drive women's health centers that perform abortions out of business through a pattern of concerted, unlawful activity.

[8] Paragraph three states:

> The National Organization for Women ("NOW") sues on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and other women who use or may use the services of such centers.

Paragraph twenty-two,[9] though lengthy, provides no additional support for the plaintiffs' position. The paragraph appears under a "Class Allegations" subdivision of the complaint and tracks the requirements of organizational standing. *See infra* at 31. Indeed, the paragraph states that NOW wishes to represent the class in order to obtain declaratory and injunctive relief. That form of equitable relief was only requested under the Sherman Act count of the Second Amended Complaint.

---

[9] Paragraph twenty-two provides:

> Plaintiff NOW brings this action on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and all other women who use or may use the services of such health centers. NOW's women members who use or may use the services of women's health centers that perform abortions have standing in their own right, the interest NOW seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual NOW members in the lawsuit. Furthermore, there is a close relationship between the interests of NOW and the interests of other women who are not NOW members who use or may use the services of women's health centers that perform abortions, and the ability of such women to represent themselves is limited. Finally, in the case of both the class of NOW's women members who use or may use the services of women's health centers that perform abortions and the class of women who are not NOW members but who use or may use the services of such health centers, the class is so numerous that joinder of all of its members is impracticable; there are numerous questions of law and fact common to the class; NOW will fairly and adequately protect the interests of the class; and the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Paragraph 105[10] is part of count II which alleges violations of RICO section 1962(a). The section 1962(a) count of the Second Amended Complaint was not reinstated by the Seventh Circuit or the Supreme Court. Count II states that it is brought "by plaintiffs DWHO and Summit and the class they represent . . ." (Second Am. Compl. § 94). However, paragraph 105 does plainly state that "the RICO Defendants' activities have injured the plaintiff class of female NOW members . . ." Paragraph 110[11] is part of count III, alleged under RICO section 1962(c), and incorporates the injuries in paragraph 105. Count III was also stated to have been brought by "plaintiffs DWHO and Summit and the class of clinics they represent . . ." (Second Am. Compl. § 106). Although the section 1962(a) claims in count II were not reinstated, count III (the section 1962(c) claim) was reinstated. By asserting that NOW and its members have been

---

[10] Paragraph 105 states:

> Specifically, the RICO Defendants' activities have decreased the business of, and/or increased the cost of doing business at DWHO, Summit, and similarly-situated clinics. The RICO Defendants' activities have injured the plaintiff class of female NOW members and other women who have been unable to obtain abortion services, or whose choice of clinics that provide these services has been restricted, by depriving them of the rights to choose freely between abortion providers in an unthreatened marketplace and to reap the economic and medical advantages of having that choice.
>
> WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action; award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

[11] Paragraph 110 provides:

> As a result of each defendant's violation of 18 U.S.C. Section 1968(c) [sic], plaintiffs have suffered the injuries described *supra* in paragraphs 104-105. WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action, award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

injured by violation of section 1962(c), NOW asserted status as a RICO plaintiff. Although not specifically stating that it brought RICO claims in paragraphs 106 and 111, NOW did plead specific facts and injury sufficient to state a claim for relief under both sections 1962(c) and (d) because it alleged the conduct that violated the statute and that NOW was injured by that conduct. *See Luckett v. Rent-A- Center, Inc.*, 53 F.3d 871 (7th Cir. 1995); *La Porte County Republican Central Comm. et. al. v. Bd. of Comm'rs of County of La Porte*, 43 F.3d 1126 (7th Cir. 1994); *Mid America Title Co. v. Kirk*, 991 F.2d 417, 422 (7th Cir. 1993); *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992).

NOW did all that is required to state a claim under RICO section 1962(c) and (d) in the Second Amended Complaint; it stated that it had been injured because of the defendants' actions that violated RICO.[12] Therefore, NOW is not barred from making RICO allegations in the Third Amended Complaint because it made the same allegations, albeit less elaborately and eloquently, in the Second Amended Complaint. This interpretation gives a reasonable interpretation to both the allegations contained in paragraph 94 and 106 (which are alleged by DWHO and Summit) as well as paragraphs 105 and 110 (which include NOW as an injured party, and therefore as a party making a claim under the count). *See* Restatement (Second) Contracts § 203(a) (year) ("an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."). NOW was a RICO plaintiff in the Second Amended Complaint, and it will be allowed to continue in that vein in the Third Amended Complaint.

---

[12] The Supreme Court's statement in *dicta* that "only DWHO and SWHO [Summit], and not NOW, have sued under RICO," *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 802, is not to the contrary.

2. Wojnar's Res Judicata Argument Against All Plaintiffs

Defendant Conrad Wojnar argues that res judicata operates to bar all Plaintiffs from bringing RICO claims against him. Wojnar claims that in the Second Amended Complaint he was charged only with violations of the Sherman Act antitrust count (count I) and under pendent state law. Because the dismissal of the Sherman Act claims was left undisturbed, Wojnar concludes that res judicata bars the prosecution of the Third Amended Complaint's RICO allegations, as to him.

Plaintiffs argue that because the preclusive effect of res judicata is only available where a final judgment has been entered, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S. Ct. 645, 649 n. 5, 58 L. Ed. 2d 552 (1979), the doctrine is not available to *Wojnar* because the dismissal was reversed. Furthermore, the Plaintiffs argue that because the *Wojnar* was a defendant as to a state law claim under the Second Amended Complaint, *Wojnar* has not suffered a final dismissal and therefore no final judgment has been issued against him.

The court will analyze Wojnar's res judicata argument using the standard set forth above of identity of parties, identity of causes of action, and finality of judgment. *Car Carriers*, 789 F.2d at 595 n. 9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982).

a. Identity of the Parties

The first prong in the analysis of whether res judicata applies is whether the parties in the first and second actions are identical. *Car Carriers*, 789 F.2d at 595 n. 9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). The identity of the parties is not in dispute; the parties are identical for the purposes of this motion.

b. Identity of Causes of Action

The second prong of the analysis is whether the causes of action in the first and second actions are identical, under the

"same transaction" test as defined by the Seventh Circuit. *Car Carriers*, 789 F.2d at 595 n. 9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). If the causes of action arise out of the "same transaction," the suits are identical for purposes of res judicata. *Id.* There is no serious contention that the claims against *Wojnar* in the Second Amended Complaint and those in the Third Amended Complaint do not arise from the same set of operative facts.

c. Final Judgment on the Merits

The third requirement for application of res judicata is that there have been a final judgment on the merits. It would appear that this requirement has been met, but Plaintiffs suggest otherwise. In count I of the Second Amended Complaint, Plaintiffs claimed that Wojnar violated the Sherman Act. The same conduct asserted to have violated the Sherman Act is now claimed to violate RICO. The Sherman Act count of the Second Amended Complaint was dismissed by the district court. *NOW v. Scheidler*, 765 F. Supp. at 937. That dismissal was affirmed by the Court of Appeals. *NOW v. Scheidler*, 968 F.2d at 612. It is not clear whether Plaintiffs included the dismissal of the Sherman Act count in their petition for certiorari to the Supreme Court, but it *is* clear that the Supreme Court did not grant certiorari on that issue. Thus, after the Supreme Court's decision in this case, the Court of Appeals reminded us that the Sherman Act claims were dismissed. *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2. Thus, it would seem, there has been a final judgment for res judicata purposes. Alas, nothing in this case is that simple.

Included in the Second Amended Complaint was also count V against Wojnar alleging "tortious interference with prospective economic advantage" under state law.[13] It was alleged that the district court had supplemental jurisdiction over

---

[13] Wojnar was named as a defendant in only counts I and V of the Second Amended Complaint.

that and other state law counts. After the remand from the Supreme Court, the Court of Appeals stated that "counts five, six, seven, which allege violations of state law, survive as well pursuant to the district court's supplemental jurisdiction. See 28 U.S.C. § 1367." *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2. Plaintiffs seize upon that language to argue that if the state law claims survive and this court retains jurisdiction over them, then there could not have been a final judgment on the merits for res judicata purposes. There are several things wrong with Plaintiff's position: First, the quoted statement by the Court of Appeals is *dicta*; second, once the order of dismissal of Count I became final, this court ceased to have jurisdiction over count V of the Second Amended Complaint; and third, Plaintiffs misconstrue the operation of res judicata in this circumstance. Count I of the Second Amended Complaint stated a claim as to which this court had federal question jurisdiction. Count V stated a claim as to which this court had supplemental jurisdiction because of its relationship to the issues raised in count I; what was previously called "pendent claim" jurisdiction. *Finley v. United States*, 490 U.S. 545, 548, 109 S. Ct. 2003, 2006, 104 L. Ed. 2d 593 (1989) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); *Hurn v. Oursler*, 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933); *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 29 S. Ct. 451, 53 L. Ed. 753 (1909)). Count I was dismissed because the district court concluded that the Sherman Act was not applicable to the conduct alleged in the Second Amended Complaint. Res judicata should bar the Plaintiffs from now amending the complaint to allege a new (RICO) theory in connection with the same alleged conduct without regard to whether there remain unresolved state law claims. A brief example demonstrates why this is so. If the allegations against Wojnar contained in count V had been made in a separate state complaint rather than in the same (federal) complaint as count V, and the federal claim had been dismissed, there is no logical reason why res judicata should not bar Plaintiffs from filing a new federal complaint asserting a

different (federal) legal theory as to Wojnar, but based upon the same operative facts. In the example, the existence of the state claim is irrelevant to the question of whether res judicata should apply to the federal claim.

Plaintiffs claims against Wojnar are barred by res judicata and will be dismissed.

II. Supplemental, Ancillary, or Pendent Jurisdiction Over Vital-Med

Vital-Med alleges that its motion to dismiss should be granted because although there was a basis for federal jurisdiction under the Second Amended Complaint, there is no such basis under the Third Amended Complaint. In the Second Amended Complaint, Vital-Med was a defendant under count I (Sherman Anti-Trust Act) and count VII (breach of a duty of confidentiality allegedly owed to DWHO and Summit). Count I was dismissed by the district court, affirmed by the Court of Appeals, and not considered by the Supreme Court. The Third Amended Complaint names Vital-Med as a defendant only in count V alleging a breach of a duty of confidentiality owed to DWHO and Summit. Vital-Med contends this court should dismiss count V of the Third Amended complaint because there is no federal question or diversity jurisdiction, and the court has no basis for exercising supplemental, pendent, or ancillary jurisdiction pursuant to 28 U.S.C. § 1367(a) ("Section 1367").

Plaintiffs contend that this court has supplemental jurisdiction over Vital-Med because federal jurisdiction was never lacking, and therefore the pendent state law claim under which Vital-Med is sued in the Third Amended Complaint is proper pursuant to 28 U.S.C. § 1367. Vital-Med contends that section 1367 does not apply to this case because it was commenced before the statute's effective date.

As the only claim against Vital-Med is stated under state law, it is clear that claim is not supplemental to any federal claim. *Cf.* 28 U.S.C. § 1367(a).

A. Applicability of 28 U.S.C. § 1367

By its own terms, section 1367 provides for supplemental jurisdiction in the federal courts "[and] *shall apply to civil actions commenced on or after* the date of the enactment of this Act. [Dec. 1, 1990]." 28 U.S.C. § 1367 note (1990) (emphasis added). Section 1367 provides that once a district court has original jurisdiction over one claim in any civil action, that same court may adjudicate "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367.

This case was originally filed on October 17, 1986. An amended complaint was filed on February 3, 1989. [Docket number 155]. The Second Amended Complaint was filed on September 25, 1989. [Docket number 236]. Vital-Med was first named as a defendant in the Second Amended Complaint, in 1989. Vital-Med contends that, for section 1367 purposes, the case against them was filed in either 1986 or 1989, and therefore the statute does not apply to them. Thus, Vital-Med maintains that the court should look to pre-1990 law to determine whether it has jurisdiction over it and count V.

The Plaintiffs disagree, relying upon the opinion of the Court of Appeals that "[c]ounts five, six, and seven, which allege violations of state law, survive . . . pursuant to the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367." *NOW v. Scheidler*, No. 91-2468, 25 F.3d 1053, 1994 WL 196761 (7th Cir. May 16, 1994). Plaintiffs argue that because the Court of Appeals relied on section 1367, at least in part, in reinstating the state law count against Vital-Med, that this court should allow the claim to survive.[14]

---

[14] The law of the case might come into play here, as the Seventh Circuit relied, with the intermediary signal "*see*" on section 1367. *See United States v. Mazak*, 789 F.2d 580, 581 (7th Cir. 1986); *United States v. South*, 28 F.3d 619, 629 (7th Cir. 1994); *Williams v. Commissioner of Internal Revenue*, 1 F.3d 502, 503 (7th Cir. 1993). However, this court need not follow the letter

This case has been in existence since 1986, and Vital-Med has been a defendant since 1989. No matter which date is the date on which the action was "commenced" for purposes of section 1367, both are before December 1, 1990, which is the date after which, by its own terms, section 1367 "*shall apply to civil actions commenced* [thereafter]." Therefore, section 1367 does not apply, and the court must look to the law of supplemental jurisdiction as it existed before section 1367 was enacted.

B. History of Supplemental Jurisdiction

In contrast to state courts, federal courts are forums of limited jurisdiction, possessing only the power to hear those cases enumerated in Article III of the United States Constitution and only to the extent authorized by Congress. U.S. Const. Art. III § 2; Friedenthal, *et al.*, Civil Procedure 64 (1992). It is fundamental that "as regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, . . . [t]he Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it* . . . [t]o the extent that such action is not taken, the power lies dormant." *Finley v. United States*, 490 U.S. 545, 547, 109 S. Ct. 2003, 2006, 104 L. Ed. 2d 593 (1989) (quoting *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252, 18 L. Ed. 851 (1868)). Originally, this meant that federal courts could not exercise jurisdiction over non-federal claims or issues that were closely related to federal claims. However, federal judges managed to accommodate the need to exercise jurisdiction over non-federal claims, and two forms of federal jurisdiction developed, ancillary and pendent jurisdiction. Friedenthal, *et al.*, Civil Procedure 64 (1992).

---

of the Seventh Circuit's ruling and assume, without analysis, that section 1367 applies because of the "*see*" signal. *A Uniform System of Citation* 23 (15th ed. 1991). The Court of Appeals was not relying directly on section 1367, rather, it was directing the reader's attention to the statute to show the general legal theory supporting its conclusion that the counts were to be reinstated. *See id.*

Originally, ancillary jurisdiction was used to allow federal courts to adjudicate claims to property where the ownership of that property was otherwise properly being litigated in federal court. *Freeman v. Howe*, 65 U.S. (24 How.) 450, 16 L. Ed. 749 (1860); 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3523 (1984). Before 28 U.S.C. § 1367 was enacted, the Federal Rules of Civil Procedure used a "transaction and occurrence" standard for compulsory counterclaims and cross-claims, thereby allowing ancillary jurisdiction over these claims. 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3523 (1984).

Pendent jurisdiction was developed by the Supreme Court in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 6 L. Ed. 204 (1824), when Justice Marshall declared that a federal court of original jurisdiction should have the power to decide all the questions that a case presented and the court needed to decide in order to function effectively. *Osborn*, 22 U.S. (9 Wheat.) at 823. As the doctrine matured, pendent jurisdiction was most commonly exercised when a plaintiff brought a federal question claim and sought to have a related state law claim against the same defendant adjudicated before the federal court. *See, e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959) (Jones Act claim provides pendent jurisdiction for maritime claim that, by itself, could only be asserted on the admiralty side of federal court.). This was called "pendent claim" jurisdiction.

"Pendent party" jurisdiction was "jurisdiction over parties not named in any claim that is independently cognizable by the federal court." *Finley v. United States*, 490 U.S. 545, 550-51, 109 S. Ct. 2003, 2007-08, 104 L. Ed. 2d 593 (1989). *Finley* expressly stated that where federal courts were asked to assert pendent party jurisdiction, "as opposed to the addition of only claims, we will not assume that the full congressional power has been congressionally authorized, and will not read jurisdictional statutes broadly." *Finley*, 490 U.S. at 549, 109 S. Ct. at 2007. Thus, pendent party jurisdiction is generally not available

unless the statute expressly authorizes it. *See id.* "Pendent claim" jurisdiction, by contrast, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .' U.S. Const. Art. III. § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); *see also Finley*, 490 U.S. at 563-64, 109 S. Ct. at 2015 (Stevens, J., dissenting).

1. Application to Vital-Med

Plaintiffs contend that the issue before the court is whether Count V against Vital-Med is a proper pendent *claim*, while Vital-Med argues that the issue is whether the court has pendent *party* jurisdiction.

It is clear from the description of the various types of supplemental jurisdiction that existed prior to the enactment of section 1367 that any jurisdiction over plaintiffs' claim against Vital-Med depends upon an assertion of pendent *party* jurisdiction. *Finley v. United States*, 490 U.S. at 550-51, 109 S. Ct. at 2007-08; *Aldinger v. Howard*, 427 U.S. 1, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976) (plaintiff was unable to bring state law claims against a completely new party although the claims arose out of the same transaction and occurrence which gave rise to the plaintiff's federal claims). Vital-Med is not a defendant under any of the federal counts in the Third Amended Complaint. Plaintiffs have not asserted that Vital-Med is diverse from the plaintiffs.

Therefore, the court will grant Vital-Med's motion to dismiss count V of the Third Amended Complaint and Vital-Med as a defendant for lack of jurisdiction.[15] *Finley v. United States*, 490 U.S. at 550-51, 109 S. Ct. at 2007- 08; *Aldinger v.*

---

[15] Vital-Med's argument regarding the inapplicability of the doctor-patient privilege to their relationship with the plaintiff clinics is therefore moot.

Howard, 427 U.S. 1, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976); *see also Kreuzfeld A.G. v. Carnehammar*, 138 F.R.D. 594, 608-09 (S.D. Fla. 1991) (following *Finley* and dismissing a non-diverse, non- federal claim defendant in a case brought before section 1367 was enacted).

2. Application to Wojnar

As stated above, any attempt to assert a new (RICO) claim against Wojnar is barred by res judicata. Therefore all that is left are the state law claims against him. These claims can only be pendent party claims and the reasoning applicable to Vital-Med are equally applicable to Wojnar. *Finley v. United States*, 490 U.S. at 550-51, 109 S. Ct. at 2007-08; *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). The state law claims against Wojnar will also be dismissed. *Id.* The court now turns to the merits of the motions to dismiss for failure to state a claim.

III. Failure to State A Claim

The Defendants allege various theories why the Third Amended Complaint fails to state a claim upon which relief may be granted. Defendants argue that the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure should be granted if the complaint does not state a cause of action upon which relief may be granted. *Corcoran v. Chicago Park Dist.*, 875 F.2d 609, 611 (7th Cir. 1989). The facts as alleged below are viewed in the light most favorable to the Plaintiffs for the purpose of determining the Defendants' motions to dismiss. *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993). Unless it appears beyond doubt that Plaintiffs can prove no facts which would entitle them to relief, the Court must deny the motion. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); *Mid America Title Co. v. Kirk*, 991 F.2d 417, 419 (7th Cir.), *cert. denied*, 510 U.S. 932, 114 S. Ct. 346, 126 L. Ed. 2d 310 (1993). However, the court need not strain to find inferences favorable to Plaintiffs which are not

apparent on the face of the complaint. *Coates v. Illinois St. Bd. of Educ.*, 559 F.2d 445, 447 (7th Cir. 1977). Similarly, the court is not required to accept legal conclusions either alleged or inferred from pleaded facts. *Nelson v. Monroe Regional Medical Ctr.*, 925 F.2d 1555, 1559 (7th Cir. 1991).

The factual allegations of this case will be outlined generally. Plaintiff NOW is a nationwide, non-profit organization dedicated to "advancing and protecting the legal rights of women." (Complaint § 7). DWHO is a Florida corporation with its principal place of business in Delaware. (Complaint § 8). Summit is a partnership with its principal place of business in Delaware. (Complaint § 9). Plaintiffs allege that all the defendants except Vital-Med[16] are involved in an "enterprise," as defined in 18 U.S.C. § 1961(4). This enterprise, called the Pro-Life Action Network ("PLAN") engages in or affects interstate commerce. According to the complaint, PLAN's common purpose is to use racketeering activity to drive out of business all clinics that provide abortion services. PLAN's activities are distinct from the pattern of racketeering activity engaged in by each defendant.

Defendants Scheidler, Terry, Scholberg, Murphy, Migliorino, Wojnar[17] and the Pro-Life Action League ("PLAL") are each persons under 18 U.S.C. § 1961(3), and are associated with PLAN by virtue of their involvement with its annual conventions as speakers and in other leadership capacities. No later than 1987, Scheidler and Terry sat on PLAN's leadership council. (Complaint §§ 11-12). Migliorino has been a featured speaker at one or more PLAN conventions. (Complaint § 16). Scheidler, Scholberg, Wojnar, Murphy, PLAL, and Vital-Med are residents of Illinois. (Complaint §§ 11, 13, 14, 15, 17, 18). Migliorino is a Wisconsin resident. (Complaint § 16). Terry

---

[16] Vital-Med will be dismissed from this case pursuant to this memorandum opinion.

[17] Wojnar will be dismissed from this case pursuant to this memorandum opinion.

and Project Life are New York residents. (Complaint §§ 12, 20). Defendants PLAL, Operation Rescue ("OR") and Project Life are each persons under the RICO statute, are associated with PLAN, and participate in PLAN by being its member groups. Since 1984, Vital-Med or its predecessor has provided pathology testing and other services to DWHO, Summit, and their affiliated clinics. (Complaint § 17).

PLAL's business consists of using racketeering activity to disrupt clinics that perform abortions. (Complaint § 18). Scheidler has been the director of PLAL. (Complaint § 11). Scholberg was the assistant director of PLAL from February, 1988 until approximately 1990. (Complaint § 13). Murphy has been a paid employee of PLAL since September, 1988, and he worked as a volunteer for PLAL before that date. (Complaint § 15). Terry has been the executive director of Project Life and was the national organizer of Operation Rescue. (Complaint § 12).

OR's business consists of using racketeering activity to disrupt and close clinics that perform abortions. OR has, through Terry and other agents and co-conspirators, engaged in racketeering activity within this district. (Complaint § 19).

Project Life has engaged in racketeering activity in this district through PLAN, Terry, and other agents and co-conspirators. (Complaint § 20).

Plaintiffs allege that the Defendants committed the following predicate acts of racketeering, including acts and/or threats of: (1) extortion against clinic personnel, patients, and suppliers of goods; (2) murder of clinic personnel, including doctors and their families; (3) kidnaping of clinic personnel, including doctors and their families; and (4) arson of clinics that provide abortion services; (4) [sic] taking possession of interstate shipments of fetal remains with intent to convert the remains to their own uses; (5) obstruction of interstate commerce by extortion and/or threats to commit extortion and/or the commission or threat of physical violence to persons

and property; and (6) travel in interstate commerce and the use of facilities in interstate commerce with intent to commit crimes of violence to further acts of extortion and/or arson, and/or to promote, manage, establish, or facilitate the promotion, management, establishment of extortion or arson. (Complaint § 2).

A. Proximate Cause and Standing

1. Standing

a. DWHO and Summit

The Terry Defendants allege that DWHO and Summit lack the necessary "proximate causation" and standing to bring both 18 U.S.C. § 1962(c) ("substantive RICO") and (d) ("RICO conspiracy") charges against them.

The plaintiff clinics argue that in addition to defendants' conduct at the plaintiff clinics the Defendants' "threats and acts of nationwide violence" satisfy the requirements of standing and proximate cause for the substantive RICO and RICO conspiracy claims. Defendants maintain that Plaintiffs' allegations regarding "illegal anti-abortion activities elsewhere [at clinics other than DWHO and Summit]" are insufficient to show proximate cause.

RICO's standing provision for civil cases, 18 U.S.C. § 1964(c), provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Thus, to have standing to assert claims for either substantive RICO or RICO conspiracy violations, a plaintiff must be injured in her "business or property" due to the violation.

The seminal case on RICO standing and proximate causation is *Holmes v. S.I.P.C.* There, the Supreme Court

concluded that under § 1964(c), the plaintiff need not be *directly* injured by the defendants. Rather, common law principles of proximate cause apply. *Holmes v. S.I.P.C.*, 503 U.S. 258, 268-70, 112 S. Ct. 1311, 1318, 117 L. Ed. 2d 532 (1992). The requirement that there be proximate cause bars a plaintiff from recovering where her injury flowed "merely from the misfortunes visited upon a third person by the defendant's acts." *Id.* (citing 1 J. Sutherland, *Law of Damages* 55-58 (1882)). In *Holmes*, the Supreme Court concluded that plaintiff Securities Investor Protector Corporation ("SIPC") did not have standing to sue a broker-dealer under RICO despite SIPC's claim that it had the subrogated rights of the broker-dealer's customers because the link between the alleged stock manipulation which caused the injury and losses to the nonpurchasing customers was too contingent on the broker-dealer's inability to pay the claims and was therefore too remote to be the proximate cause of the customers' injuries.

However, in this case, the Supreme Court has already noted that the Second Amended Complaint made sufficient allegations to confer standing. *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 803. The plaintiff clinics alleged in the Second Amended Complaint that (1) the defendants conspired to use force to induce clinics staff and patients to stop working and obtaining services elsewhere; and (2) that the conspiracy injured the business and/or property interests of the plaintiffs. *Id.* The Court stated that in light of the limited requirement that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific allegations that are necessary to support the claim," *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137, 119 L. Ed. 2d 351 (1992).), "nothing more is needed to confer standing . . . at the pleading stage." *Id.*

The following allegations are set forth as examples that show injury to the Plaintiffs and that have been connected to each of the specific defendants:

1. Attempted and actual extortion committed by Scheidler on April 11, 1986 when he threatened DWHO's clinic administrator with "reprisals" if she refused to quit her job at the clinic. (Complaint § G). [This allegedly harmed DWHO because it caused the clinic to lose personnel and be forced to retrain a new administrator. It allegedly harmed NOW's members because it hampered their ability to transact business with the clinic, and may have increased the cost of obtaining DWHO's services.]

2. Attempts, conspiracies to commit and the commission of extortion and/or physical violence by Operation Rescue when it organized a "National Day of Rescue" on October 29, 1988, and blocked access to clinics in forty cities and attempted to force the clinics to close. (Complaint § I(4)). [This allegedly harmed the plaintiffs because, reading the complaint in the light most favorable to the plaintiffs, the activities surrounding the National Day of Rescue was committed against both Summit and DWHO. This, in turn, caused the plaintiff clinics to lose business that day, and NOW's members to be unable to transact business with the target clinics on that day.]

3. Attempts, conspiracies to commit and the commission of extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL and "others" against DWHO and Summit by conspiring to steal, stealing, and hiding interstate shipments of fetal specimens. (Complaint § J(1)). [This harmed both DWHO and Summit by interfering with their business relations with Vital-Med.]

4. Scheidler, Murphy, PLAL, and "others" threatened to disclose private information about the patients of the plaintiff clinics in connection with the theft of the fetal remains. This was done in order to interfere with the actual or prospective business relations with the plaintiff clinics. (Complaint § J(2)). [The clinics argue that Defendants' actions harmed their business relationship with potential and current patients because the patients' confidential medical information could be revealed by Defendants.]

5. Attempts and conspiracies to commit extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL, and "others" against doctors working with "clinics affiliated with DWHO and Summit" by disclosing the names of the doctors who worked at the clinics. Defendants disclosed those names to induce fear in the doctors and force them (and the clinics who employed them) to forego the economic benefits of their business relations. (Complaint §§ 87(K)-87(L)). [The clinics argue that this disclosure harmed the clinics business, and NOW's ability to transact business with the clinics and the doctors practicing at those clinics.]

6. Migliorino forced Summit's new lessor to breach its lease with the clinic by threatening to disrupt and harass the other tenants if Summit were allowed to move into the building. (Complaint §§ 80-81). [This harmed Summit by having to incur the expense of finding a new location and, Plaintiffs allege, increased rental costs.]

7. Migliorino, Murphy, Wojnar, and Scheidler have used the telephone and mail to intimidate and harass clinics in at least six states. (Complaint § 35). [Causing harm to the target clinics (DWHO and Summit are not alleged to be targets of this activity) by violating the Hobbs Act and causing intimidation and harassment as well as increasing staff turnover, and increasing costs by requiring higher salaries to keep staff at the plaintiff clinics].

8. Terry was the executive director of Project Life and was the national organizer of Operation Rescue. Terry also served on the leadership council of PLAN and conspired with others in PLAN to close clinics through force and violence. (Complaint § 12). Operation Rescue and Project Life, in turn, executed over on hundred violent blockades of clinics that performed abortions. Terry participated in these blockades. (See Complaint §§ 60- 66). [This harmed the target clinics by interfering with their business relationships with patients and employees. Plaintiffs also argue that the blockades force the target clinics to give up property rights. None of these

blockades were alleged to have occurred at the plaintiff clinics' premises. However, the conspiracy to close clinics through violence could arguably affected the plaintiffs because they are clinics that perform abortions and are therefore in the class of clinics targeted by PLAN.]

9. Scholberg conspired with others at PLAN conferences and "mini-conferences" to close clinics through force and violence and participated in several violent clinic blockades (at several of which Scholberg was arrested), although none of the blockades were at either of the plaintiff clinics. (Complaint §§ 53, 55, 58). [Plaintiffs allegedly were injured by Scholberg's participation in the planning and conspiring to close clinics through force and violence.]

Thus, the allegations under the Third Amended Complaint alleges sufficient facts to satisfy general standing requirements, which is all that is required at the pleading stage. *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 803; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S. Ct. 2130, 2136 (1992); *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206- 07, 45 L. Ed. 2d 343 (1975).

b. NOW

NOW presents a special standing problem. The Scheidler Defendants allege that NOW lacks organizational standing to bring the claims under the Third Amended Complaint. Generally, an injured party must assert her own legal rights and interests and cannot rest her claim to relief on the legal rights or interests of third parties. *Warth v. Seldin*, 422 U.S. at 499, 95 S. Ct. at 2205; *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 600 (7th Cir. 1993). However, in certain circumstances, an association may have standing solely as the representative of its members. *Warth v. Seldin*, 422 U.S. at 511, 95 S. Ct. at 2211; *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d at 600; *Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1380 n. 3 (7th Cir. 1987) (citing cases). The landmark case for associational, or

organizational, standing is *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). The *Hunt* test is as follows:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343, 97 S. Ct. at 2441. Nonetheless, the possibility of representational standing does not "eliminate or attenuate the constitutional requirement of a case or controversy." *Warth v. Seldin*, 422 U.S. at 511, 95 S. Ct. at 2211; *see Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). The *Hunt* test was recently reaffirmed in *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 106 S. Ct. 2523, 91 L. Ed. 2d 228 (1986), where the Court specifically noted that very often an organization will present an especially efficient vehicle for litigation from the perspective of both the litigants and the judicial system. *Brock*, 477 U.S. at 289, 106 S. Ct. at 2532. The Court continued, "[a] preexisting organization can often draw upon a preexisting reservoir of experience, research, and capital. These resources . . . can often sharpen the presentation of issues appreciably – one of the primary concerns of the doctrine of standing." *Retired Chicago Police Ass'n*, 7 F.3d at 600 (citing *Brock*); *see Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187, 71 S. Ct. 624, 656, 95 L. Ed. 817 (1951) (Jackson, J., concurring).

The first prong of the *Hunt* test is the ability of the members of the association to sue in their own right for the alleged injury. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441; *see Brock*, 477 U.S. at 282, 106 S. Ct. at 2529. The Scheidler Defendants maintain, without citing authority, that NOW does not meet the first prong of this test because "only those NOW members injured in their 'business or property' would have standing to sue under RICO."

Plaintiffs argue, however, that "the [Third Amended] Complaint has alleged direct inference with NOW members' business and property rights sufficient to meet the first *Hunt* element. *See* §§ 4, 5; *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 351 (7th Cir. 1992)". (Response p. 20 n. 6).

This court has been given some guidance from the Supreme Court in its opinion reversing the dismissal of this case. *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 803. The Court emphasized that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137, 119 L. Ed. 2d 351 (1992). The Court concluded that DWHO and Summit had claimed sufficient injury to their business and/or property interests to confer standing on both of the clinics. *Id.* However, alleging injury is not enough; RICO requires the complaining party to have been "injured [in her] business and/or property interests" in order to establish standing. 18 U.S.C. § 1964(c). Mindful of Congress' broad remedial purposes in enacting RICO, courts have interpreted the phrase "business or property" to mean only commercial interests, as distinct from personal interests such as pain and emotional suffering. *See, e.g., Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992) (value of client's sexual activity, allegedly performed for attorney to pay legal fees incurred in divorce proceeding was not "business or property" for purposes of RICO); *Rylewicz v. Beaton Svcs.*, 888 F.2d 1175, 1180 (7th Cir. 1989) (the terms "business or property" are words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom); *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783 (9th Cir. 1992) (personal injuries, such as diminution of enjoyment of apartment suffered by tenant as result of alleged drug racketeering in neighboring apartment, not compensable under RICO); *Van Schaick v. Church of Scientology of Cal. Inc.*, 535 F. Supp. 1125, 1137 (D.Mass.1982); *Savastano v. Thompson Medical Co.*, 640 F. Supp. 1081, 1087 (S.D.N.Y.1986).

The Supreme Court has focused this court's interpretation of the "business or property" language. The Court found standing under the Second Amended Complaint because of allegations that the Defendants "conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere." *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 803.

The Third Amended Complaint alleges that NOW's members have been harmed by the Defendants' blockades, threats, and destruction because women members are unable to avail themselves of a commercial relationship; the ability to transact business with the clinics. This type of injury does indeed implicate the right to transact legal business. Moreover, this type of injury is clearly *not* the kind of injury for which courts have barred recovery under RICO – it is not a "personal" injury such as pain, suffering, or humiliation. Therefore, NOW's women members would have a right to sue in their own capacities. Thus, the first prong of the *Hunt* test is satisfied.

The second prong of the *Hunt* test is whether the interests that the organization seeks to protect or enforce are germane to the organization's purpose. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441; *see Brock*, 477 U.S. at 282, 106 S. Ct. at 2529. NOW's organizational purpose is "advancing and protecting the legal rights of women." The Defendants contend that because NOW's purpose is not abortion-specific, it may not maintain standing to prosecute this suit. Plaintiffs maintain, however, that NOW seeks to ensure reproductive freedom, which it contends is "unquestionably germane" to NOW's organizational purpose. Plaintiffs argue, moreover, that it is not necessary that the organization's sole purpose relate to the issue being litigated. Plaintiffs are correct. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441 (interests sought to be protected must be "germane to the organization's purpose"); *Brock*, 477 U.S. at 287, 106 S. Ct. at 2531 (same, *quoting Hunt*). Ensuring the right to abortions is a germane interest to NOW's purpose of protecting the legal rights of women. The fact that some do not share NOW's view

that ensuring access to abortion services advances and protects the legal rights of women does not diminish the existence of the right or the validity of NOW's interpretation of its goals. Since *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the Supreme Court has recognized a woman's right to have an abortion under certain circumstances without undue interference by the state. *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990). To the extent that the Third Amended Complaint alleges that that legal right is or has been hampered or threatened by Defendants, it conforms with NOW's purpose of protecting women's rights sufficiently to meet the second prong of the *Hunt* test.

The final prong of the *Hunt* test is whether the claim asserted or the relief requested requires the participation of individual members in the lawsuit. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441; *see Brock*, 477 U.S. at 282, 106 S. Ct. at 2529. Defendants contend that NOW cannot satisfy this prong of the test because individual members will have to participate in the suit to prove the damages that they actually suffered. Plaintiffs argue that individual members will not have to participate in the suit because NOW does not seek damages under the Third Amended Complaint, rather, it seeks injunctive relief for its members. Therefore, NOW argues, there is no need for individual participation in the suit.

NOW sues only for injunctive relief. The only potential recipients of treble damages would be DWHO, Summit, and any possible class of clinics that they might represent. Thus, there would be no need for individual NOW members to establish pecuniary loss. NOW need only show, at the pleading stage, that some members would benefit from the injunctive relief requested. *Warth v. Seldin*, 422 U.S. at 515, 95 S. Ct. at 2213 ("the remedy, if granted, will inure to the benefit of those

members of the association actually injured"); *Brock*, 477 U.S. at 288, 106 S. Ct. at 2531-32; *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d at 601. It may be necessary for at least some of NOW's membership to testify as to their impediments in receiving treatment at abortion clinics; however, the limited nature of this proof will not force NOW to violate *Hunt's* third prong. NOW has standing to sue as an association.

2. Requirement of Predicate Act as Proximate Cause

Defendants contend that even if there is standing and general proximate cause, Plaintiffs should not be allowed to prosecute this case because their injuries do not arise out of predicate acts under RICO. Plaintiffs contend that the injuries need not arise out of predicate acts, as long as the injuries arise out of acts in furtherance of the conspiracy.

The RICO statute prohibits persons engaged in an interstate "enterprise" from conducting that enterprise's affairs through "a pattern of racketeering activity." 18 U.S.C. § 1962(c). "Racketeering activity" means either any act or threat of violation of several, enumerated felonious state crimes or any act which is punishable under several enumerated federal statutes. 18 U.S.C. § 1961(1). These enumerated activities are called "predicate acts." The "pattern" requirement is satisfied if the defendant commits at least two predicate acts within a ten year period (excluding any time spent in prison). 18 U.S.C. § 1961(5).

The circuits are split on the issue of whether a predicate act must be the proximate cause of the injury. The Seventh Circuit is in the group that does not require that the injury flow from a predicate act.[18] *Schiffels v. Kemper Financial Services, Inc.*,

---

[18] *Cf.* Cases in which RICO standing was denied are generally those in which an employee-plaintiff did not allege a sufficient nexus between the alleged predicate acts committed by the employer and her termination. *See, e.g., Reddy v. Litton Industries, Inc.*, 912 F.2d 291 (9th Cir. 1990) (plaintiff who raised RICO charges in a wrongful discharge suit lacked standing under RICO because the plaintiff was the victim of an alleged wrongful discharge

978 F.2d 344 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169-70 (3d Cir. 1989) (injury from overt act that furthers RICO conspiracy is sufficient to confer standing, even if overt act is not a predicate act of racketeering); *see Reddy v. Litton Indus., Inc.*, 502 U.S. 921, 112 S. Ct. 332, 116 L. Ed. 2d 272 (1991) (White, J. dissenting from denial of certiorari) (noting split in the circuits). This Circuit adopted the *Shearin* approach in *Schiffels* and stated that there is no need to show the injury to the plaintiff arose out of a "predicate act" as long as it arose from an "overt act" in furtherance of a RICO conspiracy, thereby being injured "by reason of" the conspiracy. *Schiffels*, 978 F.2d at 349. Schiffels had RICO standing where she sued her employer under the theory that "the defendants [employer] conspired to violate § 1962(c) by conducting the affairs of an enterprise – the Kemper Plan – through a pattern of mail fraud. The defendants harassed and eventually fired her, she says, to further the conspiracy by keeping her from revealing the fraudulent scheme." *Schiffels*, 978 F.2d at 351. The Court noted that finding standing in this context would not open the floodgates to many potentially frivolous suits because the common law principle of proximate cause will still provide a limit on standing to sue under RICO. *Schiffels*, 978 F.2d at 350 (citing *Holmes*, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)).

In light of the foregoing, the plaintiffs have standing to sue for RICO conspiracy if they alleged that their injuries arose out

---

and not of any predicate act under RICO); *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151 (6th Cir. 1990) (plaintiff who alleged wrongful discharge after reporting the employer's scheme to ship defective products lacked standing to assert a RICO claim because the predicate acts of racketeering were not the cause of the alleged injury); *Flinders v. Datasec Corp.*, 742 F. Supp. 929 (E.D. Va. 1990) (plaintiff who was terminated after threatening to expose a kickback scheme lacked standing because his termination was not an injury caused by the racketeering acts). Obviously, these cases are distinguishable based on subject matter of the dispute. However, this court need not go through that analysis because the Seventh Circuit has adopted an alternative approach.

of one or more "overt acts" in furtherance of PLAN thereby being injured "by reason of" the conspiracy. *See Schiffels*, 978 F.2d at 349. It is also unnecessary to decide which of the alleged conduct would constitute predicate acts – all that is necessary is that the conduct was done in furtherance of the enterprise. *Id.*

Defendants have argued that the complaint fails to allege the existence of a RICO conspiracy under section 1962(d) with sufficient specificity. However, Fed. R. Civ. P. 8(a)(2) merely requires a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Each count of the complaint should contain such a statement. There are heightened pleading requirements for pleading fraud which are contained in Fed. R. Civ. P. 9, but they apply *only* to cases alleging fraud. "Rule 9(b) applies only to fraud or mistake, not to conspiracy. [A] pleading of conspiracy, apart from the underlying acts of fraud, is properly measured under the more liberal pleading requirements of Rule 8(a). Even so, the complaint must allege some factual basis for a finding of a conscious agreement among the defendants." *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 n. 4 (2d Cir. 1990); *see also Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989); *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 660 F. Supp. 1362, 1372 (D.Conn.1987). The requirements for pleading a RICO conspiracy are measured by the liberal pleading requirements of Fed. R. Civ. P. 8(a). *Farberware v. Groben*, 1992 WL 80722 (S.D.N.Y.1992). It is inappropriate to dismiss a complaint without allowing the plaintiffs the opportunity to discover whether, in fact, their injuries resulted from the defendants actions. The court is uncomfortably aware that this is a nine-year old case, in which some discovery has been completed. However, a Third Amended Complaint is before the court today. The age of the case does not change the liberal pleading requirements of Rule 8. As discussed above, both DWHO and Summit have pled that the defendants have conspired at PLAN meetings to (violently) close clinics that provide abortion services, and deprive NOW's

women members the opportunity to avail themselves of those services. That is all that is required at this time to state a claim of a RICO conspiracy.

Finally, Defendants Terry, Operation Rescue, and Project Life all contend that no specific allegations of predicate acts are made against them and that therefore they should be dismissed from this case. This argument misconstrues the concept of *conspiracy*. Terry is alleged to be a conspirator in the PLAN enterprise, and thus, although there are no allegations that he committed any substantive acts against the plaintiffs in his own right, he may still be held liable for *conspiring* with the other defendants. That satisfies proximate cause for the § 1962(d) conspiracy. Operation Rescue is a member of PLAN and is alleged to have orchestrated the "National Day of Rescue" which affected the plaintiff clinics individually and to have made "class-wide threats of force and violence against all clinics [that provide abortion services]." Operation Rescue has therefore allegedly committed predicate acts against DWHO, Summit and NOW. The status of Project Life is more difficult. Project Life is alleged to have organized "massive blockades" and "clinic invasions" which were designed to block access to the clinics to prevent patients and staff from entering or leaving the facility and to create a threatening and intimidating atmosphere and a public image of danger at the clinics – thereby violating "substantive RICO" under § 1962(c). (Complaint § 59). This is alleged to violate the Hobbs Act, which is a predicate act under RICO. Project Life is alleged to have participated in many of PLAN's annual conferences.[19]

---

[19] The word "participate" has given this court some difficulty. Although 18 U.S.C. § 1962(c) prohibits "conduct[ing] or particip[ation] directly or indirectly, in the conduct of [a RICO] enterprise's affairs," the term is, in the linguistic sense, broad. Webster's Third New International Dictionary 1646 (1976) ("participate" means "to take part in something, usually in common with others"). However, the Supreme Court recently interpreted the phrase and concluded that "participate" requires some "element of direction." *Reves v. Ernst & Young*, 507 U.S. 170, ---, 113 S. Ct. 1163, 1169-70, 122 L. Ed. 2d 525 (1993). The Supreme Court adopted the "operation and management"

Although this is not a predicate act per se, it does connect Project with PLAN and could give rise to conspiracy liability under § 1962(d). *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987) (RICO conspiracy law, like traditional conspiracy law, requires only that each defendant agree to join the conspiracy, not that he agree to commit each of the acts that would achieve the conspiracy's purpose.); *United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990) (Personal agreement to commit two predicate acts is not a prerequisite to RICO conspiracy liability); *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 567 F. Supp. 1146 (D.N.J.1983) (Congress specifically provided that a conspiracy to violate substantive RICO offenses is itself a violation intended to establish separate conspiracy offense distinct from substantive offenses.), *aff'd in part, rev'd in part,* 742 F.2d 786 (2d Cir. 1984) (Defendants must knowingly agree to further the affairs of the enterprise to be liable under RICO), *cert. denied,* 469 U.S. 1211, 105 S. Ct. 1179, 84 L. Ed. 2d 327 (1985). Thus, all three of the Terry Defendants have been adequately bound in this complaint under either a direct predicate act or a conspiracy theory of liability under section 1962(d).

B. Pleading Deficiencies

Defendants have alleged several pleading deficiencies in the Third Amended Complaint: (1) whether the violations of the Hobbs Act are well-pled; (2) whether a RICO conspiracy has

---

test established by the Eighth Circuit in *Bennett v. Berg*, 710 F.2d 1361, 1364 (en banc), *cert denied sub nom. Prudential Ins. Co. of America v. Bennett*, 464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983). *Reves*, 507 U.S. at ---, 113 S. Ct. at 1169-70. It is unnecessary (and impossible) for this court to analyze now whether any of the defendants' conduct rises to the level of "operation and management" of PLAN. Plaintiffs have pled that the defendants "participated" in PLAN which this court will interpret as meaning "operate or managed" in light of *Reves*. Nothing more need be pled at this time to overcome these motions to dismiss. Nonetheless, plaintiffs are reminded that they will eventually have to prove facts which shows each of the remaining defendants did something more than attended PLAN meetings and/or endorsed its positions.

been pled under § 1962(d); (3) whether a violation of § 1962(c) has been pled.

1. Hobbs Act

On remand, the Seventh Circuit directed this court to address whether the Defendants' actions violated the Hobbs Act. *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2. The Defendants come at this question from two different angles. First, the Terry Defendants contend that there simply are insufficient facts alleged upon which this court could grant relief because the Complaint fails to allege that Defendants obtained property from the Plaintiffs. Second, the Scheidler Defendants state that the Plaintiffs' reading of the Hobbs Act is too broad based upon the basic language of the statute, and the acts alleged as violating the Act simply do not state a violation. Essentially, however, both sets of defendants make the same argument: that their actions did not violate the Hobbs Act. Plaintiffs argue that the Hobbs Act predicate acts are well-pled; that there is no need to allege that the property that they lost wound up in the Defendants' hands.

The Hobbs Act is violated by anyone who "in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires to so do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to violate [this section] . . ." 18 U.S.C. § 1951(a). Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

The elements of a Hobbs Act violation are: the defendants (1) induce their victims to part with property; (2) through the use of fear; (3) with an adverse effect on interstate commerce. *United States v. Local 560 of Int'l Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986); *see* Harold Brown, *Civil RICO Practice: Causes of Action* 314 (1991); Carole

Golinski, *In Protest of NOW v. Scheidler*, 46 Ala. L. Rev. 163, n.134 and accompanying text (1994).

The definition of "property" under the Hobbs Act is expansive. *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990). The Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion . . ." *Stirone v. United States*, 361 U.S. 212, 215, 80 S. Ct. 270, 272, 4 L. Ed. 2d 252 (1960). "In a broad sense, [property includes] any valuable right considered as a source or element of wealth, including 'a right to solicit business.'" *Town of West Hartford*, 915 F.2d at 101 (quoting *United States v. Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021, 90 S. Ct. 1258, 1262, 25 L. Ed. 2d 530 (1970), and citing *Northeast Women's Center*, 868 F.2d at 1350). The property affected may be either tangible or intangible, such as the right to conduct business. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989) (citing *Local 560*, 780 F.2d 267, 281 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986), for the proposition that the Hobbs Act extends to protect intangible as well as tangible property). The right to pursue a lawful business has likewise been protected. *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204 (1928); *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969).

Indeed, the Seventh Circuit noted earlier in this case that "[t]he Hobbs Act . . . does not require that the Defendant profit economically from the extortion." *NOW v. Scheidler*, 968 F.2d at 630 n. 17 (citing *Town of West Hartford*, 915 F.2d at 102; *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983) (defendant kidnaped and threatened to kill doctor unless he agreed to stop performing abortions violated Hobbs Act); *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975)).

Extortion under the Hobbs Act, thus, focuses on the loss to the victim. *United States v. Santoni*, 585 F.2d 667, 672 (4th Cir.

1978) ("the gravamen of the offense [of extortion under the Hobbs Act] is loss to the victim," quoting *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977)). If Plaintiffs have alleged that they have sustained economic losses resulting from Defendants' actions, that is sufficient to withstand this motion to dismiss.[20] The plaintiff clinics allege that the Defendants deprived them of: (1) business between patients and themselves; and (2) a business relationship with doctors and other personnel who were induced to quit because of Defendants' actions. The right to provide abortion services has specifically been included in the "property" included in the Hobbs Act protection, *Northeast Women's Center*, 868 F.2d at 1350, as has a business' goodwill and customer revenues, *United States v. Zemek*, 634 F.2d 1159, 1173 (9th Cir. 1980). Plaintiffs also allege deprivation of certain tangible items which were damaged or lost in various blockades and "blitzes" of the clinics. Summit alleges it lost a business relationship with a potential landlord because of Migliorino's actions and interference. These allegations are sufficient to show that the Plaintiffs parted with property.

Similarly, the Scheidler Defendants' contention that the "rule of lenity" restrains this court from deciding that no economic profit is required under the Hobbs Act. The Hobbs Act violations are predicate acts in a *civil* RICO action. The rule of lenity only applies to criminal actions. *United States v. Hopson*, 18 F.3d 465, 469 (7th Cir. 1994) ("The rule of lenity dictates that when a statutory ambiguity cannot be resolved through standard methods of interpretation, the ambiguity should be resolved in favor of the criminal accused," citing *Chapman v. United States*, 500 U.S. 453, 462-64, 111 S. Ct. 1919, 1926, 114 L. Ed. 2d 524 (1991); *United States v. Bass*, 404 U.S. 336, 347-48, 92 S. Ct. 5'5, 522-23, 30 L. Ed. 2d 488

---

[20] Plaintiffs' argument that the Defendants did "obtain" or seek to obtain the plaintiff clinics' patients, and the clinics' agreement not to perform abortions is therefore superfluous. The court need not reach this argument.

(1971)). Thus, the rule is of no aid to the defendants in this case.

The court now turns to the remaining requirements to allege Hobbs Act violations. *See Local 560 of Int'l Brotherhood of Teamsters*, 780 F.2d at 281. Plaintiffs allege, and the Defendants do not contest, that they parted with this property because they feared violence would occur if they did not. Moreover, Plaintiffs allege that the Defendants, through the PLAN enterprise and individually, threatened and committed forceful and violent acts against them and other similarly situated clinics. Third, Plaintiffs have alleged the Plaintiffs' businesses function in interstate commerce, because some patients do not reside in the state where the clinics are located. Thus, Congress' power, and therefore the Hobbs Act, reaches the Defendants' activities. The Hobbs Act predicate acts are well-pled.

United States v. Enmons, 410 U.S. 396, 406 n. 16, 93 S. Ct. 1007, 1013 n. 16, 35 L. Ed. 2d 379 (1973), cited by the Defendants, is not to the contrary. *Enmons* says that when labor unions strike for legitimate purposes, the Hobbs Act does not apply to those activities. The problem is, of course, that in labor strikes, the purpose is to cause or threaten economic harm to achieve the union's purposes. Similarly, here the aim was to cause economic harm to achieve the defendants' purposes. In labor law the use of this concerted activity to cause or threaten harm is specifically sanctioned by statute – here it is not. Moreover, the ultimate goal of these defendants is to interfere with the exercise of a constitutional right. This is so far removed from the circumstances of *Enmons* that any reliance upon that case by defendants is misplaced.

Finally, the Terry Defendants' contention that this well-accepted view of the Hobbs Act would encompass "virtually any unlawful activity designed to change anyone's conduct" is erroneous. The vast majority of circuits who have passed on this issue were not concerned with this issue. Moreover, the Act is not without limits. The Act specifically limits "extortion" to

acts that were induced by wrongful use or threatened use of "*force, violence, or fear, or under color of official right.*" 18 U.S.C. § 1951(b)(2) [emphasis added]. This distinguishes the situation in which persons agree to a peaceful boycott and picketing of a business to achieve legal objectives. Thus, Defendants' examples of chaining oneself to a redwood and blocking the entrance of an auditorium would not violate the Act unless done in a manner so as to threaten force, violence, or fear. To be sure, the use of the Hobbs Act in cases such as *Northeast Women's Center* and *Town of West Hartford* may approach the limits of the Act's reach. However, Defendants are simply incorrect in asserting that allowing the Hobbs Act predicate acts stand greases a "slippery slope."

Defendants' argument that this case is analogous to sit-ins at lunch counters and Rosa Parks' civil disobedience is correct, but that argument works in Plaintiffs' favor. Indeed, many who fought segregation using civil disobedience – as well as those who used violence – *were* arrested, jailed, and otherwise punished. The court reminds the Defendants that Dr. Martin Luther King, Jr. spent many days in jail for his civil disobedience. Indeed, many of the acts of civil disobedience during the 1960's were committed to test the constitutionality of the laws that were disobeyed. Because one fights a political cause does not mean that his conduct is immunized from liability. The law applies to all citizens in this country, even those who violate the law out of conscience. Currently, the law protects clinics who perform legal procedures, including abortions. Since *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the Supreme Court has recognized a woman's right to have an abortion under certain circumstances without undue interference by the state. *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990).

2. Pleading a RICO Conspiracy

RICO prohibits any person from conspiring to violate any of its subsections. 18 U.S.C. § 1962(d). The core of a RICO civil conspiracy is an agreement to commit predicate acts. Defendants claim that the Complaint does not plead a RICO conspiracy violation with adequate specificity. The Scheidler Defendants and Migliorino argue that Plaintiffs have not alleged that there was an agreement between the parties to conduct an "enterprise." Defendants also argue that the failure to allege specifics about the "agreement" of the parties should be fatal. Plaintiffs maintain that they have alleged sufficient agreement to withstand this motion to dismiss the RICO conspiracy count.

A RICO conspiracy claim is governed by traditional concepts of conspiracy law, and "'should not require anything beyond that required for a conspiracy to violate any other crimes.'" *Schiffels*, 978 F.2d at 348 (7th Cir. 1992) (quoting *United States v. Neapolitan*, 791 F.2d 489, 497 (7th Cir. 1986), *cert. denied*, 479 U.S. 939, 940, 107 S. Ct. 421, 422, 93 L. Ed. 2d 371, 372 (1986)). "Section 1962(d)'s target, like that of all provisions prohibiting conspiracies, is the agreement to violate RICO's substantive provisions, not the actual violations themselves." *Schiffels*, 978 F.2d at 348 (citations omitted). "Thus, while a conspiracy to violate RICO requires an agreement to commit a pattern of predicate acts, it does not require that any predicate acts actually be committed." *Id.* (citations omitted). Thus, a civil RICO conspiracy complaint must allege, at the very least, an agreement to commit a pattern of predicate acts or facts from which such an agreement may be inferred. *Schiffels*, 978 F.2d at 352 (may allege facts from which agreement to violate § 1962 may be inferred); *Hecht*, 897 F.2d at 25 (must allege agreement specifically); *see Rose*, 871 F.2d at 366 (conspiracy claim must contain supporting facts which describe the conspiracy's general composition, its objectives, and the defendant's general role in the conspiracy). In other words, the agreement which is alleged under section 1962(d) must be pled with at least some degree of particularity.

All that is required by the Seventh Circuit at this stage is that the Plaintiffs allege (1) that each defendant agreed to conduct the affairs of an enterprise; (2) that each defendant agreed to the commission of at least two predicate acts (or to the furtherance of the enterprise through predicate acts); and (3) that each defendant knew that those predicate acts were part of a pattern of racketeering. *Schiffels*, 978 F.2d at 352; *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 939, 940, 107 S. Ct. 421, 422, 93 L. Ed. 2d 371, 372 (1986).

The Plaintiffs have met this burden as to all defendants except Wojnar and Project Life, who will be dismissed from this case. Plaintiffs have alleged that the other defendants (except Vital-Med) have agreed to drive all clinics who furnish abortion services out of business – in fact, that was the purpose of their organization of PLAN. The Complaint alleges that Scheidler and Terry sat on PLAN's leadership council. (Complaint §§ 11-12). PLAL and Project Life **participated**[21] in the annual PLAN meetings. (Complaint § 41 (PLAL only), 49 (PLAL only), 55, 58). Scholberg attended a "mini-conference" in St. Louis on December 14, 1986, as well as other PLAN meetings. (Complaint §§ 53, 55). Migliorino **participated** in the PLAN convention in Chicago from August 25 to 27, 1988 and forced Summit's prospective landlord to breach the lease between the parties. (Complaint § 58, 80-81). Operation Rescue was part of PLAN's project to blockade clinics in furtherance of PLAN's purpose to close abortion clinics down, and conducted several blockades in New York City, Long Island, Cherry Hill, New Jersey and Atlanta. (Complaint §§ 60, 63, 64, 66). Murphy organized some of the OR blockades and assisted in the theft and storage of fetal remains from Vital-Med. (Complaint §§ 65, 69, 70, 71). Murphy also **participated** in annual PLAN conventions. (Complaint § 84). Scholberg, for example, attended a PLAN "mini-conference" on December 14, 1986 in

---

[21] See *supra* note 19 regarding what the plaintiffs must prove "participate" means in order to state a section 1962(c).

St. Louis, Missouri, took part in the annual PLAN convention in Atlanta, Georgia on May 2, 1987, and was the assistant director of PLAL from February, 1988 until approximately 1990. (Compl. §§ 13, 53, 54). PLAL allegedly took part in numerous PLAN conventions and **participated** in the organization and execution of several violent clinic blockades. (RICO Case Stmt. pp. 13-14).

Thus, plaintiffs have alleged that each of the defendants except Wojnar, Project Life, and Vital-Med have participated in PLAN's affairs as an enterprise, which is all that is required to plead substantive RICO. The rest of the defendants have an affiliation with PLAN and showed at least tacit agreement to "operate or manage" its affairs. The question is whether tacit agreement alone states a RICO conspiracy sufficient to withstand these motions to dismiss. Defendants have argued that this court should require proof of at least some overt act in furtherance of the conspiracy. In making this argument, defendants not only espouse the minority position, they ignore the law of this circuit. *Compare United States v. Garver*, 809 F.2d 1291 (7th Cir. 1987); *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 939, 940, 107 S. Ct. 421, 422, 93 L. Ed. 2d 371, 372 (1986); *United States v. Angiulo*, 847 F.2d 956, 964 (1st Cir.), *cert. denied*, 488 U.S. 852, 928, 109 S. Ct. 138, 314, 102 L. Ed. 2d 110, 332 (1988); *United States v. Tripp*, 782 F.2d 38, 41 (6th Cir.), *cert. denied*, 475 U.S. 1128, 106 S. Ct. 1656, 90 L. Ed. 2d 199 (1986); *United States v. Local 560*, 780 F.2d 267, 294-95 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986); *United States v. Pepe*, 747 F.2d 632, 659 (11th Cir. 1984); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011, 103 S. Ct. 1249, 1250, 75 L. Ed. 2d 479 (1983); *with United States v. Schell*, 775 F.2d 559, 568 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098, 106 S. Ct. 1498, 89 L. Ed. 2d 898 (1986) (criminal RICO case in which proof of overt act in furtherance of the RICO conspiracy required); *United States v. Boldin*, 772 F.2d 719, 727 (11th Cir.

1985), *cert. denied*, 475 U.S. 1048, 106 S. Ct. 1269, 89 L. Ed. 2d 577 (1986).

The Seventh Circuit has stated "[t]he substantive proscriptions of the RICO statute apply to insiders and outsiders – those merely 'associated with' an enterprise – who participate directly and indirectly in the enterprise's affairs through a pattern of racketeering activity." *United States v. Garver*, 809 F.2d 1291 (7th Cir. 1987) (quoting *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978)). In other words, if Plaintiffs have alleged that the Defendants committed acts in furtherance of PLAN, that is enough to show agreement to the conspiracy. Nothing more is required. The clearest form of agreement is Scheidler's and Terry's participation in PLAN's leadership council. By participating in this council, both Scheidler and Terry agreed to lead PLAN which, in turn, is alleged to be an illegal enterprise. This agreement to participate in PLAN's activities, coupled with the agreement to commit predicate acts, establishes "operation and management" and therefore potential liability against Terry and Scheidler. *See Reves*, 507 U.S. at ---, 113 S. Ct. at 1169.

"Participation" in PLAN's annual meetings by Murphy, Migliorino, and PLAL are closer calls. However, the allegations that these parties participated in meetings are coupled with allegations of the commission of other activities in furtherance of PLAN's purpose to shut down abortion clinics. Either one of these allegations, standing alone, would be insufficient to impose liability under § 1962(d). However, taken together, the allegations show sufficient agreement to meet the first prong of the *Schiffels* analysis (that each defendant agreed to conduct the affairs of the enterprise). Thus, the first prong of the analysis is satisfied.

The second prong in the analysis is whether each defendant agreed to the commission of at least agreed two predicate acts, or at least to the furtherance of the enterprise. *Schiffels*, 978 F.2d at 352; *Frymire v. Peat, Marwick, Mitchell & Co.*, 657 F. Supp. 889 (N.D. Ill. 1987); *United States v. Dempsey*, 768 F.

Supp. 1256 (N.D. Ill. 1990). Defendants contend that this statement of the law is insufficient. Defendants argue that they must have agreed to participate in each predicate act. This is patently wrong. All *Schiffels* requires in order for a defendant to be held liable for RICO conspiracy under § 1962(d) that he or she *agree* to the commission of at least two, but only two, predicate acts. *Schiffels*, 978 F.2d at 352. Moreover, there is some support within this circuit for an even lesser standard: that the defendants agree to conduct themselves on behalf of an enterprise. *United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990) (Personal agreement to commit two predicate acts is not a prerequisite to RICO conspiracy liability); *Frymire v. Peat, Marwick, Mitchell & Co.*, 657 F. Supp. 889 (N.D. Ill. 1987).

This does not mean that each defendant must have *committed* two predicate acts – only that each *agree* to their commission. In other words, each defendant must have agreed to the commission of two acts in furtherance of the enterprise, or, at a minimum, agreed to the furtherance of the enterprise generally. The Complaint passes this test as to all defendants except Wojnar, who has never been alleged to have attended a PLAN conference or participated in PLAN's leadership.

The final prong of this test is whether the defendants knew that the acts were committed in a pattern of racketeering, *Schiffels*, 987 F.2d at 352, with "awareness of the nature and scope of the enterprise and intended to participate in it." *United States v. Muskovsky*, 863 F.2d 1319, 1324 (7th Cir. 1988), *cert. denied*, 489 U.S. 1067, 109 S. Ct. 1345, 103 L. Ed. 2d 813 (1989). Plaintiffs have met their burden here as well. PLAN's essential purpose, viewed in a light most favorable to Plaintiffs, was to engage in a pattern of racketeering activity (such as blockades and theft) that was designed to inflict, and has inflicted, injury on the business and property of plaintiff clinics who provide such services. (Complaint §§ 1, 41). Clearly, Scheidler and Terry, who sit on PLAN's leadership council, have sufficient understanding of PLAN's workings to know the

scope of the enterprise. This knowledge may also be imparted to PLAL, who in June of 1984, is alleged to have participated in the formulation of a six-month "plan of national activities." (Complaint § 37). Scholberg's awareness, viewed in light favorable to the Plaintiffs, may be inferred from his participation in PLAN's mini-conference on December 14, 1986, in which it was specifically agreed that one of their goals was to close down clinics that perform abortion. (Complaint §§ 53-54). OR's and Project Life's awareness, viewed in light most favorable to Plaintiffs, may be inferred from its "participation" in PLAN's annual conferences in which PLAN declared that it would try to stop abortions at clinics "by any and all means available. No abortion clinic will be spared," and where blockades were endorsed as necessary to take business away from the clinics. (Complaint §§ 55, 58). Murphy's awareness of the scope of the enterprise may be inferred from his "participation" in PLAN conferences, including being a featured speaker. (Complaint § 58). The court reminds the plaintiffs that it cannot conclude that simply attending one PLAN meeting would necessarily show that the defendant understood the scope of the enterprise.

Migliorino's awareness of the scope of the enterprise is tenuous. Migliorino allegedly participated in one PLAN conference on August 25-27, 1988, in which the overall goal of shutting abortion clinics down was discussed, and she was a speaker. (Compl. § 17). The substantive allegations against Migliorino involve one cluster of conduct surrounding the theft of fetal remains from Vital-Med, and one cluster involving interference with Summit's future landlord. (Complaint §§ 67-75, 80-81). The court concludes that these actions, taken together in a light most favorable to Plaintiffs, could show that Migliorino participated in and was aware of the scope of the enterprise, and she will not be dismissed now. It is possible that the Plaintiffs could prove some set of facts which would entitle them to relief against Migliorino under § 1962(d).

Wojnar, on the other hand, has not been named under "substantive RICO," and the only action that he is alleged to have participated in is the theft of the fetal remains. (Complaint §§ 82, 67-71). This need not be addressed here, as he will be dismissed on procedural grounds.[22] All other Defendants remain under section 1962(d), with the possible First Amendment concerns of this conclusion addressed below.

3. Other Predicate Acts

Defendants have made various arguments about each of the predicate acts alleged in the complaint. The court will address each in turn.

a. Travel Act and State Law Extortion as Predicate Acts

The Terry Defendants argue that the Travel Act allegations are insufficient because the Travel Act requires that underlying acts of extortion, bribery, or arson be pled. Moreover, the Defendants maintain that extortion under the Travel Act requires that property be obtained by the perpetrator. Plaintiffs argue that no property need be received by the perpetrator; all that need be satisfied is that state extortion statute be violated.

Plaintiffs maintain that the extortion laws of Alabama, Colorado, Florida, Hawaii, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New

---

[22] Even if Wojnar were not dismissed on procedural grounds, this court would dismiss him from this complaint based on lack of awareness of the scope of the enterprise. Facts that would imply Wojnar's awareness of the scope of the enterprise are limited. Wojnar points out in his reply that the Amended RICO Case Statement implicates him in two other actions; a May 11, 1985 clinic invasion and blockade and a November 11, 1985 clinic invasion and blockade. (RICO Case Statement p. 36). All these actions could be individual occurrences, without any input from or understanding of the PLAN enterprise. Thus, Wojnar would have been dismissed here based on lack of knowledge of the scope of PLAN. *United States v. Muskovsky*, 863 F.2d 1319. Wojnar's arguments regarding the sufficiency of the predicates as alleged against him will not be addressed, nor will his statute of limitations argument be considered; both of these arguments are moot as to him.

Hampshire, New Mexico, North Dakota, Rhode Island, Tennessee, Texas, Vermont, Wisconsin, and Wyoming do not require that the defendant receive property from the victim; only that the victim to give up either a tangible or an intangible property right.[23] Plaintiffs also argue that Defendants violated these laws.

The Travel Act was primarily designed to stem the "'clandestine flow of profits' and to be of 'material assistance' to the States in combating pernicious undertakings which cross State lines." *Nardello*, 393 U.S. at 292, 89 S. Ct. at 538 (quoting S. Rep. No. 644, 87th Cong. 1st Sess., 4 (1961)). The Travel Act reaches:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to –
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity.
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3). . . .

18 U.S.C. § 1952. Unlawful activity as defined in the Travel Act includes extortion, bribery, and arson "in violation of the laws of the State in which committed or of the United States." 18 U.S.C. § 1952(b). Unlike the Hobbs Act, the Travel Act does not define "extortion" in the statute; it leaves the definition up to individual state law. *United States v. Nardello*,

---

[23] The clinics wish to maintain this suit as a class action, which could bring virtually every other state's extortion statute into play. However, because the class has not yet been certified, there is no need to address those other statutes at this time.

393 U.S. 286, 289 n. 3, 89 S. Ct. 534, 536 n. 3 (1969). Thus, if the violations of the underlying state law extortion statutes are well pled, so are the Travel Act violations.

At common law, "extortion" could only be committed by a public official who obtained property not due to him or his office under color of law. *Id.* Many states have expanded upon such definition to include acts committed by private individuals whereby property is obtained by force, fear, or threat. *Id.* DWHO and Summit (Delaware and Wisconsin residents, respectively) have each pled violations of their state extortion statutes. Only Delaware and Wisconsin law will be addressed because, although plaintiffs wish to maintain this as a class action, the only plaintiffs currently before the court are DWHO and Summit.

The relevant Delaware statute provides:

> A person commits extortion when, with the intent . . . he compels or induced another person to deliver property to himself of to a third person by means of instilling in him a fear that, if the property is not so delivered, the defendant or another will:
>
> (1) Cause physical injury to anyone; or
>
> (2) Cause damage to property; or
>
> (3) Engage in other conduct constituting a crime; or
>
> (4) Accuse anyone of a crime or cause criminal charges to be instituted against him; or
>
> (5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject anyone to hatred, contempt, or ridicule; or
>
> (6) Falsely testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

> (7) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
>
> (8) Perform any other act which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation, or personal relationships.

Del. Cod. Ann. tit. 11, § 846 (1990).

Defendants allege conclusorily that this statute requires obtaining property and plaintiffs have failed to allege this element. Plaintiffs maintain that they *have* alleged that Defendants obtained property from them because Delaware's definition of property is broad enough to encompass DWHO's agreement not to enter business relationships with their patients.

Only a state court can authoritatively interpret its own state statutes and laws. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369, 91 S. Ct. 1400, 1404, 28 L. Ed. 2d 822 (1971); *Waldron v. McAtee*, 723 F.2d 1348, 1352 (7th Cir. 1983). Delaware apparently has not construed the definition of property in this context. The parties have cited no authority on the matter, and the court's independent research has found a similar void. In the absence of guidance from Delaware state courts, a federal court should decide the issue in a way in which it believes the highest state court would rule of the issue were presented to it. *L.S. Heath & Son, Inc. v. AT & T Information Systems, Inc.*, 9 F.3d 561, 574 (7th Cir. 1993). This is difficult here, as it requires this court, sitting in Illinois, to determine what the Delaware Supreme Court would decide. In this difficult circumstance, this court will focus on the language of the statute itself.

In its statute on theft, Delaware's definition of property is: "*anything of value except land,* and includes . . . documents although the rights represented thereby have no physical location, contract, rights, choses in action. . . ." Del. Cod. Ann.

tit. 11 § 857(4) [emphasis added]. Moreover, Delaware Supreme Court *has* concluded: "[t]he offense [of extortion] is complete when the threatening statement or communication is made, or is caused to be made with the intent to extort or wrongfully gain money or other property." *Bilinski v. State*, 462 A.2d 409 (Del.1983) (quoting *Bove v. State*, 33 Del. 229, 134 A. 630 (Del. Supr.1926)).

Property is defined as "anything of value except land . . . including rights that have no physical location." Del. Cod. Ann. tit. 11 § 857(4). It appears that the Delaware legislature attempted to make its theft statutes as broad as possible in order to combat crime most effectively. This court has already concluded that in the Hobbs Act context, the right to do business and conduct business relationships is protected "property." *See supra* at 1072. Using a parallel analysis here, this court concludes that Delaware intended to have its crime statute reach as broadly as possible, just as Congress intended to allow the Hobbs Act broad scope. DWHO's right to conduct business relationships with both its patients and its personnel are therefore protected by Del. Cod. Ann. tit. 11 § 846. Plaintiffs have pled that the Defendants obtained, or attempted to obtain the clinics' agreement not to enter into business relationships with patients, doctors, and personnel. Plaintiffs specifically pled that Scheidler entered DWHO, threatened clinic administrator Cathy Conner. (Complaint § 46). Plaintiffs allege that on April 12, 1986, Scheidler threatened that anti-abortionists would "get rid of" clinics such as DWHO. (Complaint § 47). The Plaintiffs' allegations satisfy Delaware § 846(8), which prohibits threatening to perform acts calculated to harm DWHO's business relationships. The Delaware extortion allegations are well-pled as either attempted or actual extortion.[24] The Travel Act is violated when the underlying

---

[24] To establish the commission of attempted extortion, Plaintiffs must show, inter alia, that the defendant took a substantial step toward "instilling" fear in another that he would cause "physical injury to anyone" or "damage to property," if property other than his own were not delivered to him. *Bilinski*

state's law is violated and that violation affects interstate commerce. Thus, the Travel Act allegations, as alleged by DWHO, are also well-pled.

The same arguments are maintained by Summit regarding the Wisconsin extortion statute. The relevant Wisconsin statute prohibits individuals from:

> [V]erbally or by any written communication, maliciously threaten[ing] to accuse or accuses another of any crime or offense, or threatening or commit [ing] any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling, or trade of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act . . .

Wisc. Stat. Ann. § 943.30 (1995).

The Terry Defendants claim that the phrase "with intent thereby to extort money or any pecuniary advantage whatever" combined with the disjunctive "or with intent to compel the person so threatened to do any act against the person's will . . ." shows that this statute was designed to address two offenses; extortion by the first clause and coercion by the second. Further, Defendants point out that only extortion, and not coercion, is a predicate RICO offense. Thus, they argue, the Wisconsin extortion statute does not reach the conduct alleged in the Complaint.

Plaintiffs maintain that the Defendants have misconstrued the Wisconsin statute, and they cite both state and federal law in support of their position that Wisconsin does not require that property be "received." The Wisconsin Court of Appeals has held that "extortion may . . . be committed if no property or money is transferred, but the victim is coerced to do something

---

v. State, 462 A.2d 409 (Del.1983); Del.Cod.Ann. tit. 11 §§ 531, 846(1), (2).

against his or her will." *State v. Dauer*, 174 Wis.2d 418, 497 N.W.2d 766, 771 (App.1993). However, this conclusion was made in the context of distinguishing the Wisconsin extortion statute from the state robbery statute. Thus, this analysis is not as forceful as if the court had decided a case similar to this one, where the extortion/coercion distinction was at issue. However, no such a case has been cited or found. Thus, it is fair to conclude, in the absence of contrary authority, that Wisconsin does not require the receipt of property to be proven in order to establish an extortion offense.

Moreover, intangible property rights, such as choses in action, have been held to constitute "property" under Wisconsin's § 943.30. *State v. Manthey*, 169 Wis.2d 673, 487 N.W.2d 44 (App.1992), *rev. denied,* 491 N.W.2d 768 (Wis.1992) (Defendant who was prospective witness in a civil action and who threatened to have extensive memory lapses at trial unless she was paid to testify committed extortion by threatening to injure litigant's property interest in the suit). Thus, Defendant's argument that the right to conduct business relations is not recognized in Wisconsin is invalid. The Complaint's allegations that Plaintiffs were forced to give up their right to conduct business relationships state a valid claim for relief under Wisconsin law. The Travel Act allegations are likewise valid, as the underlying state law claims have been properly pled. *See United States v. Nardello*, 393 U.S. 286, 89 S. Ct. 534, 536 n. 3, 21 L. Ed. 2d 487 (1969).

b. Theft of Fetal Remains As Predicate Act

Plaintiffs have pled violations of 18 U.S.C. § 659,[25] which prohibits theft from interstate shipment, as predicate RICO acts. The section 659 allegations arise out of Defendants' alleged theft of fetal remains and medical information thereon from Vital-Med's facility. The Scheidler Defendants claim that these allegations do not state valid predicate RICO acts because the fetal remains were not alleged to have been valued over one hundred dollars, as required by RICO 18 U.S.C. § 1961(1). Plaintiffs argue that they have pled enough to withstand this motion to dismiss, and that they will prove at trial that the fetal remains were worth "far more" than the one hundred dollar requirement.

In order for a section 659 violation to be a predicate act under section 1961(1), the act must be felonious. Under section 659, a defendant may only be convicted of a felony if the value of the property in question is at least one hundred dollars. *United States v. Brookins*, 52 F.3d 615, 619 (7th Cir. 1995). "Value" is defined in section 659 as "face par or market value, whichever is greater." *Id.* (quoting *United States v. Ditata*, 469 F.2d 1270, 1273 n. 3 (7th Cir. 1972). Market value, in turn, is "the price a willing buyer will pay a willing seller at the time and the place the property was stolen or at any time during the receipt or concealment of the property." *Id.* (quoting *United*

---

[25] 18 U.S.C. § 659 provides:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, stationhouse, platform or depot . . . with intent to convert to his own use any goods or chattels moving as or which are a part or which constitute an interstate or foreign shipment of freight, express or other property; or

. . . . .

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money baggage, goods, or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

States v. Bakken, 734 F.2d 1273, 1278 (7th Cir. 1984). The *Brookins* court was concerned with the sufficiency of the evidence which showed that the defendant was guilty of stealing a camera. Evidence was admitted showing that the undercover agent who arrested the defendant had been offered the camera for $350, to which the agent eventually agreed. *Brookins*, 52 F.3d at 617-18. The court concluded that this evidence was "more than sufficient" to establish the value of the camera over one hundred dollars. *Id.* at 619-20.

This case has a different procedural posture. Instead of reviewing a trial court's conclusion of the value of the property, this challenge comes in the form of a motion to dismiss. This court concludes that the Plaintiffs should have the opportunity to show that the fetal remains and the accompanying medical information were worth more than $100. It would be premature to dismiss the section 659 allegations without allowing Plaintiffs such an opportunity.

That being said, this court emphasizes the test set forth in Brookins will guide the evaluation of the evidence of the value of the property. However, in light of the lenient pleading requirements of the Federal Rules of Civil Procedure, the court will not dismiss the section 659 violations at this time. The Defendants are on notice of what dates, times, and actions support the Section 659 claim; that is all that is required of the Complaint at this juncture.

C. Availability of Injunctive Relief

The Plaintiffs have sued under 18 U.S.C. § 1964(c), which provides standing for private plaintiffs to enforce RICO. The subsection provides that any civil plaintiff "shall recover" treble damages and a reasonable attorney's fee. The Scheidler Defendants contend that this narrow statement of available relief precludes the Plaintiffs from suing to obtain equitable relief. Plaintiffs contend that they are entitled to seek injunctive relief, and, moreover, even if it is not so entitled, the form of relief to be obtained is "not a Rule 12(b)(6) issue."

Although Plaintiffs may be correct that, generally speaking, the form of relief is not an issue upon which a court could base a dismissal, this case raises peculiar issues in a unique posture. *See Doe v. U.S. Dept. of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985) (court cannot dismiss a claim as long as some relief may be granted from facts alleged on the face of the complaint, citing 5 Wright & Miller, *Federal Practice and Procedure* § 1357 at 602 and n. 77 (other citations omitted)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (court must be able to address the alleged injury with a favorable decision).

Section 1964, entitled "Civil Remedies," provides in subsection (a):

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by *issuing appropriate orders, including, but not limited to:* ordering any person to divest himself of any interest, direct or ...direct, in any enterprise; *imposing reasonable restrictions on the future activities* or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

[Emphasis added]. Thus, it is clear that Congress intended to allow courts to issue injunctive relief.

Nonetheless, the circuits are divided on whether private parties may petition the court for injunctions for civil RICO violations. *Conkling v. Turner*, 18 F.3d 1285, 1296 (5th Cir. 1994) (declining to reach the issue, but noting the split in the circuits). Some courts have concluded that this relief is not available to private parties, *see Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986) (expressly holding injunctive relief not available to private litigants under

RICO), *cert. denied,* 479 U.S. 1103, 107 S. Ct. 1336, 94 L. Ed. 2d 187 (1987); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) ("substantial doubt about whether RICO grants private parties . . . a cause of action for equitable relief."); *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987, 994 (N.D. Ill. 1984) (RICO does not permit equitable remedies such as declaratory judgment and recision), while others have concluded that private plaintiffs *may* avail themselves of equitable remedies. *Lincoln House, Inc. v. Dupre*, 903 F.2d 845 (1st Cir. 1990) (declining to reach the issue, but assuming that the district court could grant equitable relief); *In re Fredeman Litigation*, 843 F.2d 821, 830 (5th Cir. 1988) (holding that RICO does not authorize injunctive relief against transfer of all defendant's assets in a RICO action for treble damages, but not deciding "whether all forms of injunctive or other equitable relief are foreclosed to private plaintiffs under RICO"); *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34 (1st Cir. 1986) (in order to obtain injunctive relief, plaintiff must show irreparable injury, substantial likelihood of success on the merits, a weighing of the equities in the plaintiff's favor, and a public benefit); *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390 (5th Cir. 1986) (same); *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986) (same); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (implying that equitable relief may be available under RICO), *aff'd on reh'g,* 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied,* 464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y.1983) (reasoning that Congress did not intend "to deprive the district court of its traditional equitable jurisdiction" to grant injunctive relief for alleged violations of RICO statute), *aff'd other grounds,* 730 F.2d 905 (2d Cir. 1984), *see also* Batista, *Civil RICO Practice Manual* 169 (1987) (§ 6.13--The Availability of Injunctive Relief).

The Seventh Circuit has not yet ruled on this issue. However, in light of the Supreme Court's instruction that

"RICO is to be read broadly" and that the very purpose of the statute is to "supplement and strengthen the means already available for fighting crime," *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 498, 105 S. Ct. 3275, 3286, 87 L. Ed. 2d 346 this court is reluctant to read the statute in a limited way. Moreover, there is substantial authority for allowing private parties to seek equitable remedies, and even though that authority does not arise in this circuit, this court is persuaded by the rationale in those opinions. The court concludes that the Plaintiffs may seek the equitable remedies they ask for in the Third Amended Complaint. *Lincoln House*, 903 F.2d 845 (1st Cir. 1990); *In re Fredeman Litigation*, 843 F.2d 821, 830 (5th Cir. 1988); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y.1983). Having concluded that the court's power encompasses the Plaintiffs' prayer for the court to "enjoin Defendants and their co-conspirators from further racketeering activity," the court notes that any potential injunction or "reasonable restrictions" imposed must pass muster under the First Amendment.

IV. First Amendment Concerns

Just two issues remain before the court at this time; both involve claimed constitutional rights. These issues are addressed last because, although they are part of the mandate of the Seventh Circuit, courts are constrained to decide cases without reference to the federal constitution whenever possible. *Redgrave v. Boston Symphony Orchestra Inc.*, 855 F.2d 888, 911 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043, 109 S. Ct. 869, 102 L. Ed. 2d 993 (1989). The first issue deals with the extent to which the First Amendment protects Defendants' actions, and the second concerns the facial constitutionality of the RICO statute.

A. Freedom of Speech

The Seventh Circuit directed this court to address, "if necessary, . . . which of the defendants' activities, as alleged, are protected by the First Amendment to the United States Constitution." *Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2.

This direction follows Justice Souter's comment in concurrence: "even in a cases where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Scheidler*, 510 U.S. at ---, 114 S. Ct. at 807 (Souter, J. concurring).

The Defendants argue that the use of civil RICO is inappropriate in this context because, even if they did commit predicate acts, their actions, including the allegations of attempt, advocacy, and commission of arson, kidnapping and murder, were done in the furtherance of their political beliefs. Therefore, Defendants argue, those actions are protected by the First Amendment. Defendants focus on three paragraphs containing predicate acts under count I (RICO § 1962(c)) of the Complaint in support of their position: paragraphs 87N, 87O, and 87Q. Paragraph 87N alleges that the RICO Defendants committed a predicate act of:

> **Encouraging, organizing, and inciting** the commission of arson, in violation of state arson and extortion laws, including but not limited to **[1] urging** the destruction of "bricks and mortar," and **[2] declaring** that arson is not "violence"; **[3] applauding and endorsing** acts of arson by co- conspirators'; **[4] encouraging, inciting and inducing** acts of arson through letters, speeches, films, various writings, and other media; **[5] urging** followers to act as if violence were permissible if it were to stop abortions; **[6] praising** the depiction of co-conspirators in front of clinics destroyed by arson; **[7] teaching** followers (including highly susceptible and vulnerable individuals) that arson is

> trivial and is justified if it prevents an abortion; **[8] encouraging** those who have committed arson to keep up their work **and assisting** them in doing so; **[9] ridiculing** those who reject force and violence as a method to express their opposition to abortion, including but not limited to calling them "wimps," "wimps-for-life" and similar expressions; and **[10] encouraging** followers to emulate those who have been convicted of arson on repeated occasions. [Numbers and emphasis added].

Paragraph 87O alleges that the RICO Defendants "attempt[ed] and conspir[ed] to kidnap . . . **by encouraging, organizing, and inciting** the kidnaping of doctors who perform abortion . . . [emphasis added]" Paragraph 87Q alleges that the RICO Defendants attempted to commit murder **"by encouraging and inciting** members of the enterprise to commit murder. [emphasis added]" Although the Defendants do not cite other paragraphs of the complaint which may run afoul of the First Amendment, there are others which the court, in an independent analysis, believes call the First Amendment into question. These paragraphs[26] and the allegations contained therein will also be addressed because the Seventh Circuit has mandated that this be done.

Plaintiffs argue that they treasure the First Amendment and its protections as much as the Defendants, but that Defendants' acts are not immunized simply because they were committed with a political goal. Plaintiffs contend that the actions alleged in the complaint go beyond the protections of free speech and move into unprotected, violent action and/or unconstitutionally protected "incitement" speech.[27] Plaintiffs argue that to the

---

[26] The paragraphs are: §§ 28, 29, 30, 33, 36, 42, 45, 47, 57, 58, and 74.

[27] Plaintiffs also make significantly broader arguments regarding the First Amendment's application to the Complaint. For example, they argue that their reference to Scheidler's book *Closed: 99 Ways to Stop Abortion* in paragraphs 29 and 30 of the Complaint is admissible to show Scheidler's intent, even though the book is clearly covered by the First Amendment's

extent that free speech issues are implicated by the Complaint, they may be adequately addressed by giving a proper jury instruction at the time of trial. (Response p. 4 n. 6). Plaintiffs also argue that the Defendants' speech and actions have created a "context of violence" which causes them to fear for their safety if they were to pursue their rights as clinics to operate. Because the speech and actions created this "context," Plaintiffs argue, both the speech and the acts run afoul of the First Amendment and should be enjoined.

Central to the concept of civil liberties in this society is the idea of freedom of speech. The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the government for a redress of grievance.

U.S. Const. amend. I. "The First Amendment is a charter for government, not an institution of learning. 'Free trade of ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 3423, 73 L. Ed. 2d 1215 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 537, 65 S. Ct. 315, 325, 89 L. Ed. 430 (1945)). Further, as Justice Brandeis aptly stated in his concurrence in *Whitney v. California*, 274 U.S. 357, 375, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J. joined by Holmes, J., concurring), *overruled other grounds, Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), freedom of conscience is essential to the "discovery and spread of political truth," to "stable government," and to "political change." Courts must therefore be extremely cautious of interpreting this important right in a limiting fashion. A key difficulty in freedom of speech

---

protection and cannot be argued to be a predicate act. (Response p. 2 n. 1). None of the defendants chose to raise this issue in their motions to dismiss. Nonetheless, this court must address them as mandated by the Seventh Circuit.

litigation, and the critical problem in this case, is defining "speech" distinct from the actions surrounding it and from the actions the speech may, in turn, produce. *See* Lawrence Tribe, *American Constitutional Law* 788 (2d Ed.1988).

The essential issue in this analysis is whether the words used by the Defendants fall into the "fighting words" exception to First Amendment protection. If the speech that Defendants engaged in falls within this exception, this court has authority to enjoin similar future speech. *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) is the current state of the law regarding "subversive advocacy," or "fighting words," or speech that calls for or tends to produce or incite violence. In *Brandenburg*, the Supreme Court struck down an Ohio law which was not "directed to inciting or producing *imminent* lawless action [emphasis added]" and "likely to produce such action" yet nonetheless prohibited speech. *Brandenburg*, 395 U.S. at 447, 89 S. Ct. at 1829. *The only way that a state may regulate speech is if the speech* does *call for immediate illegal acts which are likely to occur following the speech.*

Thus, in order to qualify as "fighting words," the speech must (1) incite imminent illegal activity and (2) be likely to produce such activity. The freedom of speech is an essential right which is to be abridged only where "emergency . . . makes it immediately dangerous to leave the correction to time." *Abrams v. United States*, 250 U.S. 616, 630-31, 40 S. Ct. 17, 22, 63 L. Ed. 1173 (1919) (Holmes, J. dissenting); *see* Tribe, *American Constitutional Law* at 844.

Some commentators have argued that the "imminence" standard requires that the time between the speech and the action be so brief that there is no opportunity for rebuttal or reflection. *See* David A.J. Richards, *Toleration and the Constitution* (1986) (Arguing that the best way to protect free speech is to allow the freedom to reach the boundaries of "equal liberty of conscience," which is the essential element of this society.) Plainly, "the mere abstract teaching . . . of the moral

propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Brandenburg*, 395 U.S. at 448, 89 S. Ct. at 1830 (quoting *Noto v. United States*, 367 U.S. 290, 297-98, 81 S. Ct. 1517, 1520-21, 6 L. Ed. 2d 836 (1961).

In *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, the Court reversed a judgment which awarded damages caused by a seven-year boycott organized by the plaintiff NAACP and its members, which was imposed against defendants, who were white-owned businesses, to achieve integration. *Claiborne Hardware Co.* is factually similar to this case because both cases dealt with political protest mixed with violence. The *Claiborne Hardware Co.* boycott consisted of picketing and "disciplining" African Americans who continued to patronize white-owned stores. The "discipline" consisted of members of the NAACP, called "Black Hats" or "Deacons," who stood outside white-owned stores and identified African Americans who transacted business with them. The Deacons then published the names of the "offenders" both orally at the NAACP meetings, and in a paper called the "Black Times." The lower court also observed that four incidents which clearly involved violence occurred because the victims ignored the boycott, and noted six others that showed an "unlawful form of discipline was applied to certain boycott violators." *Claiborne*, 458 U.S. at 905, 102 S. Ct. at 3421. Half of those ten incidents were found to have occurred in 1966, but none were conclusively found to have occurred after 1966, even though the suit was brought in late 1969. The Court concluded that the "coercion, intimidation, and threats" were "part of the boycott activity" and were protected by the First Amendment. *Claiborne*, 458 U.S. at 906, 102 S. Ct. at 3423. However, and importantly, the Court expressly distinguished *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, *reh'g denied*, 312 U.S. 715, 61 S. Ct. 803, 85 L. Ed. 1145 (1941). In *Milk Wagon Drivers* the Court upheld an injunction that prohibited both violent and nonviolent picketing and protesting activity

because of the violent environment and conduct surrounding the activity. The *Claiborne* court distinguished *Milk Wagon Drivers* by stating, "in this case [*Claiborne*] the Mississippi Supreme Court has relied on isolated acts of violence during a limited period to uphold respondents' recovery of all business losses sustained over a 7-year span." *Claiborne*, 458 U.S. at 924, 102 S. Ct. at 3431. Thus, the Court gave great importance to the context of the violence in which the speech/nonspeech activities rested. Where there is a context of violence over the entire time span of the suit, and that violence is of a serious nature, such as was the case in *Milk Wagon Drivers* (in which at least fifty instances of window-smashing, explosive bombings, stench bombs, destruction of trucks and stores, serious injury to drivers and storekeepers, arson, threats and the like), the Court gives greater weight to the protection of citizens and property and less to free speech concerns. The protest speech in *Milk Wagon Drivers* occurred by both words and violent actions. Indeed, that court constructed the question as "whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are *enmeshed* with contemporaneously violent conduct which is concededly outlawed." *Milk Wagon Drivers*, 312 U.S. at 292, 61 S. Ct. at 554. The violence which was used to protest the method of milk distribution was plainly not protected by the First Amendment, although the picketing plainly was. However, where the protest activity is relatively peaceful, with only minor breaches of the peace, it is more likely that the Court will guard free speech privileges of the protesters with greater vigilance. More importantly, when peaceful and violent activity are "enmeshed," that fact counsels in favor of regulation of the entire range of action.

Plaintiffs contend that this case is analogous to *Milk Wagon Drivers* and argue that the context in which the Defendants' speech was conducted should remove it from the protection of the First Amendment. Plaintiffs have alleged the following specific acts which provide a context of violence in which Defendants' alleged "speech" took place:

(a) Between June, 1984 and the end of 1985: forty (40) acts of arson on clinics that provide abortion (§ 40);

(b) In March of 1986: one attempted arson (§ 44); March 26, 1986: one occurrence of destruction of clinic property (§ 43); assault and physical injury of five persons, four on March 26, 1986 and one in December of 1987 (§§ 57, 87D);

(c) On April 12, 1986: one occurrence of criminal trespass and harassment (§ 48);

(d) Twelve individually cited violent blockades in which at least one of the Defendants participated and, inter alia, blocked traffic in and out of the clinics and in which confrontations with police and patients occurred and hundreds of arrests were made on April 19, 1986, November 28, 1986, November 29, 1986, April 30 through May 2, 1987 (one per day – three total), August 27, 1987, November 28, 1987, and May 2 through 5, 1988 (one per day – four total) (§§ 44, 49, 51, 55, 58, 62, 63, 87D, 87I(1));

(e) Beginning July 19, 1988 and continuing until December 1988, a series of Operation Rescue actions occurred in Atlanta, Georgia (§ 64);

(f) On October 29, 1988, which was called the "National Day of Rescue" pro- life activists blockaded forty clinics across the country and in Toronto, Canada (§ 65);

(g) Local Operation Rescue activities have continuously taken place across the country, in which more than 10,000 participants have been arrested (§ 66);

(h) On March 10, 1993, conspiracy to commit and commission of the murder of Dr. David Gunn.

Thus, a total of over one hundred violent events have been specifically alleged within the nine-year time span covered by the Third Amended Complaint. Although these acts must be assumed to be true by this court, they do not necessarily mandate that all of Defendants' free speech rights have been

forfeited. "Right to free speech in the future cannot be forfeited because of dissociated acts of past violence." *Milk Wagon Drivers*, 312 U.S. at 296, 61 S. Ct. at 556. Protected free speech, which involves words and not actions, is not implicated by the activities outlined above in (a) through (h). The Plaintiffs must allege that the protected speech, such as inciting, encouraging, and the like, is "enmeshed" in the violent acts. Specifically, Plaintiffs must allege that the Defendants' speech activity was so closely linked in time and place to the violence that the law must intervene and prohibit the provocation from occurring. They have not done so here.

Moreover, this complaint seeks not only to enjoin the Defendants from "further racketeering activity," which may or may not include speech, but it also seeks to impose civil damages for activities which clearly include speech to some degree. *See* §§ 87N, 87O, 87Q (alleging predicate acts consisting of encouraging, organizing, inciting, urging, declaring, endorsing, praising, teaching, and ridiculing others to further the pro-life cause) and p. 67, *supra*. These verbs all describe *speech* and not violence in any way. The alleged speech is patently and firmly within the boundaries of freedom of expression. Those paragraphs must be stricken from the Complaint, as they do not allege predicate acts – rather, they allege legal protest actions protected by the freedom of expression.

Moreover, the protections of the First Amendment are usually used as a shield and not as a sword. *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189, 1200 (D. Mass. 1985) ("The legal system stands ready to shield freedom against unlawful government intrusion, but reluctant to use the sword of damages to vindicate one claim of freedom by striking down another."), *modified*, 855 F.2d 888 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043, 109 S. Ct. 869, 102 L. Ed. 2d 993 (1989). RICO was not enacted to collapse the freedom of speech; it was enacted to give federal peace officers a powerful weapon with which to fight organized crime.

The Defendants have called into question only three paragraphs, while the court has found a total of seventeen which implicate the First Amendment. As noted, the Seventh Circuit mandated that this court address the issue of the First Amendment as it relates to this action. This court is obliged to address "which of the defendants' activities, as alleged, are protected by the First Amendment," and therefore all seventeen paragraphs will be discussed.

Encouraging activity which was not immediately followed by violence is protected by the First Amendment. "Immediately" means within a period which does not give time for reflection. Although the Supreme Court has not set forth a "bright-line" interpretation of what "immediately" means in this context, this court assumes it to mean at maximum a twenty-four hour period. The Plaintiffs' attempt to analogize to the situation in *Milk Wagon Drivers* fails because the protected speech and the violent activities are insufficiently linked. Having stated the court's conclusion, the specific paragraphs of the compliant need to be addressed. Unfortunately, Plaintiffs have alleged both protected speech and unprotected lawless action in the same paragraph, so it is difficult to specifically navigate and strike[28] full paragraphs. Moreover, as noted above,

---

[28] To strike portions of a complaint, the allegations being challenged must be so unrelated to plaintiff's claims as to be void of merit and unworthy of any consideration. *Robinson v. The Midlane Club, Inc.*, 1994 WL 577219 *2 (N.D. Ill. Oct. 19, 1994). Further, the presence of the references sought to be stricken must be prejudicial to the movant. *Pelech v. Klaff-Joss, L.P.*, 828 F. Supp. 525, 536-37 (N.D. Ill. 1993) (acknowledging the seriousness implied in any poorly supported allegations, but denying motion to strike where argument at issue was not devoid of merit); *Tektel, Inc. v. Maier*, 813 F. Supp. 1331, 1334 (N.D. Ill. 1992). Motions to strike are brought pursuant to Fed. R. Civ. P. 12(f) and are generally disfavored. *Robinson v. The Midlane Club, Inc*, 1994 WL 577219 *2 (N.D. Ill. Oct. 19, 1994), *see, e.g., Imperial Constr. Management Corp. v. Laborers' Int'l Union, Local 96*, 818 F. Supp. 1179, 1186 (N.D. Ill. 1993) (granting a motion to strike affirmative defenses because they only added clutter to the case and because they were without merit, but upholding general rule disfavoring such motions); *Tektel*, 813 F. Supp. at 1334; *Van Schouwen v. Connaught Corp.*, 782 F. Supp. 1240,

it is unclear what weight several of the paragraphs are to be given because they have not been incorporated into count I, although they were incorporated into count II.

Paragraphs 29, 30, and 33[29] will be stricken in their entirety because they allege protected speech without any direct correlation with violent activity other than the "violent context" which was outlined above. This violent context, standing alone, simply cannot support the expansive restraint that Plaintiffs would impose on Defendants' freedom of speech. The phrase

---

1245 (N.D. Ill. 1991); 5A Charles Alan Wright, Arthur R. Miller, Federal Practice and Procedure § 1380, at 647 (1990). Nonetheless, striking portions of a complaint is appropriate when "certain references in a pleading . . . not the entire paragraphs containing them should be stricken." *Id.* at 651. This court will, to the extent necessary, strike only those portions of the Complaint which are wholly void of merit and serve only to implicate validly exercised First Amendment activities.

[29] Paragraph 29 provides:

> Scheidler has distributed throughout the United States a manual, *Closed: 99 Ways to Stop Abortion,* outlining methods intended to be used to interfere with clinics such as DWHO and Summit. Scheidler's manual encourages the use of predicate acts of racketeering activity to drive clinics such as DWHO and Summit out of business.

Paragraph 30 provides:

> Scheidler has traveled throughout the country training other persons to use racketeering activity, including but not limited to the methods outlined in *Closed: 99 Ways to Stop Abortion.*

Paragraph 33 provides:

> Terry has traveled throughout the country encouraging, organizing, and training other persons to use racketeering activity, including blockades designed to stop ingress and egress to the clinics, to close clinics that provide abortion and this force Plaintiffs to give up property rights.

in paragraph 28[30] "encouraging others to participate in" will be stricken, as it does not apparently relate to violent activity.

Paragraph 36[31] directly correlates Scheidler's conference workshop presentation and a blockade at the Women's Awareness Clinic in Fort Lauderdale, Florida. Although Plaintiffs do not specifically allege that the blockade was violent, the court cannot conclude with certainty, given the violent factual context of many of these blockades, that this blockade was completely peaceful. Thus, in this posture, the court cannot strike the allegations contained therein.

Paragraph 42[32] is closely linked in time with a violent invasion of the Ladies Center of Pensacola, Inc. and therefore

---

[30] Paragraph 28 provides:

> In pursuit of their goal to drive every clinic out of business, Defendants (except Vital-Med) have traveled throughout the country, and/or used interstate telephone lines and U.S. Mail services for the purposes of engaging in, and/or *encouraging others to participate in*, their enterprise, which is devoted to the commission of racketeering activity at clinics such as DWHO and Summit. [Emphasis added]

[31] Paragraph 36 provides:

> From May 10 to 12, 1984, the first National Pro-Life Conference, entitled "Action for Life" was held in Ft. Lauderdale, Florida. Scheidler presented a conference workshop on "Effective Confrontation: A 'How-To' of Picketing, Leafletting, Sit-Ins and Blitzes." He also spoke at a "Ready for Action" rally. As part of their training, approximately 200 conference participants were taken by bus from the convention to the Women's Awareness Clinic, a Fort Lauderdale clinic that offers abortion services. They surrounded the clinic, blocking all entrances and exits.

[32] Paragraph 42 provides:

> On March 25, 1986, Scheidler, PLAL, and others led a workshop in Pensacola, Florida, designed to encourage local residents to join them in using racketeering activity to drive clinics that perform abortion out of business.

will not be stricken. Paragraphs 45 and 47[33] are likewise linked in time with Scheidler's criminal trespass and harassment occurring on April 11, 1986 at DWHO. Although these activities are not violent per se, they are criminal. However, a showing of non-violent criminal activity alone is not enough. The freedom of speech is one of this country's most highly prized freedoms, and the Supreme Court has stated in no uncertain terms that preventing violence is the only valid reason for squelching that right. Paragraphs 45 and 47 will be stricken because the facts as alleged do not provide the factual basis to infringe the freedom of speech as required by *Milk Wagon Drivers*.

Paragraph 57[34] does not contain an allegation regarding the length of time that passed between the threats and incitation and the physical assault that occurred. In light most favorable to the Plaintiffs, the court cannot strike the paragraph.

Paragraph 58 contains a direct link between speech and an unprotected violent "lock and block," and therefore will not be

---

[33] Paragraph 45 provides:

> In April, 1986, Scheidler traveled to Delaware to organize and train persons to use his methods for shutting down clinics such as DWHO and to galvanize them into action.

Paragraph 47 provides:

> On April 12, 1986, Scheidler threatened that anti-abortionists "will get rid of [clinics such as DWHO]. I proclaim that Delaware is going to become the first state in the union to be free of abortion activities.

[34] Paragraph 57 provides:

> In December 1987, after numerous threats by Scheidler that he would close a Chicago women's health center and after incitation by Scheidler to give that clinic "a hard time" and to "molest" it, co-conspirator Anthony Lesniewski physically assaulted a security guard at the American Women's Health Center by attempting to run him over with a vehicle.

stricken. Paragraph 87N (see *supra* at 67) contains no non-speech allegations and therefore will be stricken in its entirety. The phrase "by encouraging, organizing, and inciting" will be stricken from paragraph 87O. The phrase "by encouraging and inciting members of the enterprise to 'treat abortion like murder,' in the context of actual murder and attempted murder of doctors who perform abortion" will be stricken from paragraph 87Q.

V. Constitutionality of RICO

The final constitutional question that is at issue in this case is the facial constitutionality of RICO. The Scheidler Defendants challenge both statutes based on overbreadth and vagueness.

A. Vagueness

The Scheidler Defendants' vagueness argument points briefly to four aspects of RICO which could be the seed for this court to find that the statute is void for vagueness: (1) defining the "pattern;" (2) the scope of the "enterprise;" (3) applying the conspiracy crime to the enterprise; and (4) the impossibility of determining the "precise mental state that must be proved" in being liable for agreeing to engage in the enterprise. Amazingly, the Scheidler Defendants do no more than set forth these areas of difficulty without citing a single case in support of their position. Nor do they expand their accusations beyond pointing to the "fuzziness of [RICO's] contours of coverage about their [sic] outer fringes, [and] the vagueness of its provisions." Scheidler's Memo in Support at 15.

Although Justice Scalia invited facial challenges to RICO based on vagueness in *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229, 253-56, 109 S. Ct. 2893, 2908-09, 106 L. Ed. 2d 195 (1989) (Scalia, J. concurring), the statute has been consistently upheld, despite a shower of challenges. *See, e.g., United States v. Sanders*, 962 F.2d 660, 678 (7th Cir. 1992); *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991), *cert. denied*, 500 U.S. 919, 111 S. Ct. 2019, 114 L. Ed. 2d 105 (1991); *United*

States v. Andrews, 749 F. Supp. 1517, 1519 (N.D. Ill. 1990) (Aspen, J.). More importantly, the Seventh Circuit has reaffirmed RICO's constitutionality "despite Justice Scalia's statements concerning the pattern requirements in his concurrence in H.J. Inc." *United States v. Ashman*, 979 F.2d 469, 487 (7th Cir. 1992) (citing cases).

In light of this overwhelming precedent, the only basis upon which this court could sustain a vagueness attack on the statute would be to read the Supreme Court's conclusion in this case that there is no economic motive requirement for RICO. The parties have made no such argument as somehow changing the analysis to be applied in evaluating constitutionality. Under the decided cases, there is no logical argument that might implicate *vagueness* (as opposed to overbreadth) in light of the lack of economic motive requirement. Thus, this court will follow *Ashman* and conclude that RICO is not unconstitutionally vague. Moreover, the Defendants have not outlined even the roughest thumbnail sketch of how the other three "seeds" could implicate a vagueness argument – not even a single law review article is cited supporting their position generally. Defendants apparently assume that this court will not only consider their argument, it will construct it as well. The court declines the invitation.

B. Overbreadth

The overbreadth challenge is more substantial. The overbreadth doctrine recognizes the "governmental purpose to control or prevent activities subject [to] regulation" while acknowledging that goal "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). An overbreadth challenge questions the statute facially because, given a reasonable interpretation of the scope of the statute, the statute reaches potentially protected speech. The analysis to be engaged in is "whether Congress has adopted a constitutional means in achieving its concededly legitimate [goal]." *United States v.*

Robel, 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967) (Warren, C.J.).

An overbreadth challenge may be brought based on a party's belief that the statute is unconstitutional as enforced against it, but also on the ground that the statute's application to third persons not before the court violates the First Amendment. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 & n. 17, 104 S. Ct. 2118, 2125 & n. 17, 80 L. Ed. 2d 772 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); *Adult Video Ass'n v. Barr*, 960 F.2d 781, 787 (9th Cir. 1992). For the Plaintiffs to prevail, there is no need for them to argue that the statute is unconstitutional *in this case*. Rather, the court invalidates the entire statute "on its face," so that the overbroad law becomes unenforceable until a property authorized court construes it more narrowly. Gerald Gunther, *Constitutional Law* 1191 (12th Ed.1991), *see Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). In order to strike a statute based on overbreadth, the court must find that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. at 616, 93 S. Ct. at 2918. *Broadrick* emphasized that overbreadth invalidations were generally inappropriate where the allegedly impermissible implications of the challenged statute affected "conduct" rather than "speech." *Broadrick*, 413 U.S. at 616, 93 S. Ct. at 2918. In other words, if the statute in question is largely directed toward legitimately criminal activity, and merely touches the First Amendment ever so slightly at the margin, that statute need not be stricken because the overbreadth is not "substantial."

The Supreme Court recently considered the possibility that the forfeiture provisions of RICO are overbroad in *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993). The *Alexander* defendants challenged RICO because, they argued, the forfeiture provisions are not limited solely to

obscene materials and the sale of such materials. *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. at 2774. However, the Court recognized that this was an "unprecedented use of the overbreadth principle." *Id.* Importantly, the court stated in *dicta*:

> *But the RICO statute does not criminalize constitutionally protected speech* and therefore is materially different from the statutes at issue in our overbreadth cases. *Cf., e.g., Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75, 107 S. Ct. 2568, 2572, 96 L. Ed. 2d 500 (1987).
>
> Petitioner's real complaint is not that the RICO statute is overbroad, but that applying RICO's forfeiture provisions to businesses dealing in expressive materials may have an improper "chilling" effect on free expression by deterring others from engaging in protected speech.

Alexander v. United States, 509 U.S. at ---, 113 S. Ct. at 2774 [Emphasis added]. The Court concluded that the chilling effect of forfeiting protected materials is no greater than the chilling effect of a prison term, or a large fine. *Id.* Although Defendants' brief is woefully devoid of an articulation of *why* RICO is overbroad, this court will attempt to anticipate their argument so it may be addressed here.[35] This court believes that

---

[35] It seems clear that Defendants do not care how this court decides on these constitutional issues, given the lack of attention they gave their briefing of them. Defendants simply want this court to rule so they may reach the Court of Appeals and the Supreme Court on these issues. This court assumes that the Defendants will brief the issues with greater attention to detail at higher levels. However, the Defendants are reminded that they may appeal only those issues which were properly decided by this court; they may not raise new arguments at the appellate level that were not raised here. *U.S. Equal Employment Opportunity Comm'n v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 n. 11 (7th Cir. 1995) (citing *Citizens Ins. Co. v. Barton*, 39 F.3d 826, 828 (7th Cir. 1994)). Defendants have done themselves a great disservice by not adequately briefing these issues because they will be bound on what they may appeal by what this court decides.

Defendants wish to make a "chilling" argument similar to that raised in *Alexander* regarding freedom of association. Defendants argue that allowing RICO to be used in this context threatens "others engaged in a variety of First Amendment activity." This court interprets that statement to mean that the freedom to associate with groups who engage in protected free speech activity as well as illegal acts is "chilled" by the threat of RICO prosecution. However, Defendants miss the point of *Alexander*'s *dicta* quoted above: there will be no threat of prosecution if there is no illegal activity committed on the part of the individual defendant. RICO, standing alone, does not criminalize or chill speech, period. Speech is not implicated by the statute one iota. To be sure, if the individual defendant engages in illegal activity in furtherance of the purpose of the organization, that activity is in no way immunized by either the fact that the defendant also spoke out in support of his cause, nor by the fact that the defendant is a member of an organization who supports, encourages, or advocates the illegal activity. As noted above, support, encouragement, and even "incitement" is not criminal unless the illegal activity so closely follows the speech in question that the speaker may be thought of as the "cause" of the illegality. But RICO itself has nothing to do with that conclusion. RICO is not overbroad.

Finally, this court declines to address Defendant's argument that RICO is unconstitutional because it does not require a showing of "specific intent" to violate the statute. Specific intent is required to show a violation of a criminal statute. *Scales v. United States*, 367 U.S. 203, 221 n. 11, 81 S. Ct. 1469, 1482 n. 11, 6 L. Ed. 2d 782 (1961). Although RICO may be used criminally, this is a civil case. As such, the issue of specific intent is not relevant. Defendants, in their brief, attempt to confuse the issue by blending in the overbreadth analysis with their argument regarding specific intent. However, overbreadth analysis, and its accompanying relaxation of the standing requirement, is unique to First Amendment issues. There is no such relaxation of the standing requirement for consideration of other constitutional challenges. Defendants do not have

standing to challenge the absence of a "mens rea" requirement here. *Scales*, *Alexander*.

VI. Conclusion

For the reasons stated in this memorandum opinion, IT IS HEREBY ORDERED THAT:

1. Defendant Conrad Wojnar is DISMISSED from this action;

2. Defendant Vital-Med is DISMISSED from this action;

3. Paragraphs 29, 30, 33, 45, 47, and 87N of the Third Amended Complaint are STRICKEN;

4. The phrase "encouraging others to participate in" is STRICKEN from paragraph 28; the phrase "by encouraging, organizing, and inciting" is STRICKEN from paragraph 87O; the phrase "by encouraging and inciting members of the enterprise to 'treat abortion like murder,' in the context of actual murder and attempted murder of doctors who perform abortion" is STRICKEN from paragraph 87Q.

The court also concludes that RICO is facially constitutional as analyzed under both vagueness and overbreadth standards.

APPENDIX E

United States District Court, N.D. Illinois.

NATIONAL ORGANIZATION FOR WOMEN, INC., and its women members and other women who use or may use the services of women's health centers that provide abortions; Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on behalf of themselves and all other similarly-situated clinics, Plaintiff,

v.

Joseph M. SCHEIDLER; Andrew Scholberg; Timothy Murphy; Pro-Life Action League, Inc.; and Operation Rescue, Defendant.

No. 86 C 7888.
July 28, 1999.

MEMORANDUM OPINION AND ORDER

COAR, J.

Before this court are various post-trial motions filed by both the defendants Joseph Scheidler and Operation Rescue ("defendants") and the two plaintiff classes represented by the National Organization for Women ("NOW") and two reproductive health clinics, Delaware Women's Health Organization, Inc. ("DWHO") and Summit Women's Health Organization ("Summit") (together, as "plaintiffs"). Defendant filed a motion to decertify the class of NOW members and non-members as well as decertify the class of clinics. The plaintiffs filed a motion to amend the complaint to conform to the evidence as well as a motion for Phase II damage trials. Plaintiffs also filed a petition for injunctive relief. Defendants' motion for decertification of the two classes is DENIED. Plaintiffs' motion to amend the complaint to conform to

evidence is DENIED. Plaintiffs' motion for Phase II damage trials is DENIED. The court GRANTS the plaintiffs' petition for a permanent injunction against defendants for a period of twelve years. All other motions are denied as moot.

Background

After thirteen years, this long and controversial case is entering one of its final stages. This case consists of a plaintiff class of reproductive health clinics and a class of potential women patients who brought claims arising under § 1962 of the Racketeer Influenced and Corrupt Organizations Act ("civil RICO") against the defendants, a group of anti-abortion protestors. After a lengthy trial that occurred from March 4, 1998 through April 14, 1998, the jury returned a verdict for the plaintiffs on these civil RICO claims. While the procedural history of this case is recounted in detail in previous opinions,[1] the evidence presented at trial must be reviewed in order to understand the post-trial motions before this court.

At the trial, evidence spanning a period of twelve years of various incidents at reproductive health clinics was presented. This evidence included incidents across the entire United States: Chicago, Illinois; Wichita, Kansas; Cherry Hill, New Jersey; New York, New York; Farmington, Michigan; Jackson, Mississippi; Dobbs Ferry, New York; Fargo, North Dakota; Wilmington, Delaware; Atlanta, Georgia; San Antonio, Texas, to name a few. Several of these events were videotaped and showed defendant protestors chaining themselves to clinic doors and surrounding patients to block their path to the clinic entrances. Over the weeks of the trial, witnesses testified to the various acts of the defendants and others. A select few are described below:

---

[1] See generally *NOW v. Scheidler*, 510 U.S. 249 (1994); *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), cert. granted, 508 U.S. 971 (1993); *NOW v. Scheidler*, 1997 WL 610782 (N.D. Ill. 1997); *NOW v. Scheidler*, 897 F. Supp. 1047 (N.D. Ill. 1995); *NOW v. Scheidler*, 1995 WL 592228 (N.D. Ill. 1995).

-In Washington, D.C., busloads of protestors rushed the doors of a clinic, pressing the bodies of clinic staff members and volunteers against the clinic entrance as they screamed they were being crushed. As one witness testified, "several of us started yelling as loud as we could, 'please stop pushing. We're going to get hurt." (Transcripts, p. 1008).

-In Milwaukee, Wisconsin, protestors repeatedly banged on the car of a patient as she entered a health clinic parking lot, and grabbed at her arms and legs as she attempted to enter the clinic. "They surrounded me and my car. Telling me I wasn't a Christian, a baby killer. That I'm going to go to hell for this. Shoving pamphlets in my hand. Trying to stop me from making my way to the door of the building." (Transcripts, p.1916). The patient was visiting the clinic to receive her pap smear results and to receive her contraceptive medication.

-In Wilmington, Delaware, protestors forcibly entered a clinic and wreaked havoc. These protesters destroyed medical equipment, entered operating rooms where clinic staff and patients were engaged in appointments, tore down cabinets, destroyed medication and medical equipment, and chained themselves to medical and operating room tables. (Transcripts, p. 663).

-In Chico, California, a clinic administrator and two clinic escorts were physically smashed up against the entrance doors of a clinic by hundreds of protestors for four and a half hours. When the clinic administrator told the protestors that she was scared and was being crushed, she heard protestors shout, "Don't pay any attention to them. They're murderers. They're baby killers. Whatever happens to them is God's will." (Transcripts, p. 1445). The glass entrance to the clinic was shattered and the clinic administrator received bruises on her legs and arms from the event.

-In Los Angeles, California, a patient who was visiting a health clinic was assaulted by protestors. The patient had an appointment at the clinic for follow-up after a surgery to repair

and restore her reproductive organs. However, she was confronted by the defendant protestors before she could enter the clinic:

> "All of a sudden, a crowd of people came running from both sides of the building towards the parking lot, towards us . . . They were shouting 'murderer, baby murderer.'. . somebody grabbed me by the back of my hair, and I fell up against the car. Then I just saw all of these people, and they were grabbing their arms and grabbing at me. I didn't know what was happening, and I was yelling for [my friend] to help me. Then [my friend] was pushing the people away, and they were fighting . . . I remember rolling down the side of the car, and the people were hitting me. Then I remember looking up to call out to ask God to help me. As I looked up and yelled 'oh, God help me,' a man hit me in the head with a big old sign. It was at this point that I grabbed [my friend's] arm and [he] grabbed me, and I put my arms around [his] waist. Then [he] was pushing the people away, and they were still grabbing and pulling at me. Then I felt myself going down, and I got scared, real scared. It was just so many people, and they were fighting and grabbing at me, and they were yelling thing like 'murderer.' I wondered, who did I kill? Who did I hurt?" (Transcripts, p. 1519).

> The patient lost consciousness as she began to bleed from her abdomen for protestors had caused her surgical incision to be torn open. Protestors rocked and beat her car as clinic personnel rushed the patient to the trauma unit of a nearby hospital. (Transcripts, pp. 1520-1522).

These are just a few examples of the incidents presented to the jury throughout this trial. Repeatedly, witnesses testified to the fear and intimidation they felt from the actions of protestors. One clinic volunteer testified, "They were . . . shoving and elbowing and smashing. I mean, they were right within less than an inch of us . . . [Y]ou know, you start sweating. You're scared. Your heart's pounding." (Transcripts, p. 1444). A

patient recounted, "I was hysterical. I was afraid. I thought they were going to kill me." (Transcript, p. 1522). A clinic administrator reflected, "I was concerned about the injury to our staff and to our patients, not only the physical injury of the building itself and the equipment but also the emotional injury and distress to our patients and to our staff, who were terrified . . ." (Transcripts, p. 663).

These incidents were connected to the organizational efforts of the Pro-Life Action Network (PLAN) and Operation Rescue (OR) and the leadership of these organizations through Joseph Scheidler and other named defendants. PLAN was founded in 1984 to bring anti-abortion activists together to coordinate their activities across the United States. Scheidler and the founding members of PLAN believed that the lobbying and legislative efforts of other anti-abortion organizations, such as the National Right to Life, were not effective. (Transcripts, p. 3936). PLAN founding members believed in more "aggressive tactics," such as blocking clinic doors with their bodies and other objects in order to stop clinic patients and staff from entering the clinic, a tactic called "rescues." (Transcripts, pp. 3936-37). Scheidler, John Ryan, and Andrew Scholberg laid the initial ground work for PLAN.

The first meeting of PLAN occurred in Ft. Lauderdale, Florida in 1984. Over 600 activists attended, with Scheidler acting as the chair of the meeting. (Transcripts, pp. 3974, 4124). At that meeting, the "Leadership Council" was created with a geographic distribution to cover the entire United States. (Transcripts, p. 3990). PLAN began its initial fundraising efforts, promoting itself as an organization with over 2000 members with a network of regional directors to coordinate "rescue" activities. (Transcripts, pp. 3977-79). Eventually, PLAN created paid positions for a Director and an Associate Director, as well as paid for the travel expenses of the Leadership Council to various "rescues," or protests, across the country. (Transcripts, pp. 4098-99, 4255).

In 1987, at a PLAN Leadership Council meeting in Washington, D.C., Operation Rescue ("OR") was born. (Transcripts, p. 4085). The stated purpose of OR was to be "to overwhelm the law enforcement system and gain free access to the clinics without legal consequences." (Transcripts, p. 4091). The PLAN Leadership Council gave approval for the formation of OR, and to Randall Terry as its director, and agreed to OR's first field training, in Cherry Hill, New Jersey. (Transcripts, p. 4088). PLAN and OR began to act as joint organizations, where Randall Terry sat on the board of PLAN, Scheidler sat on the board of OR, and the two organizations began joint fundraising efforts. (Transcripts, pp. 4087, 4226, 4253).

The stated purpose of both PLAN and OR was "to put clinics out of business." (Transcripts, pp. 4149). In particular, these two groups were to work "behind the scenes" of the anti-abortion movement and use aggressive tactics, such as "rescues" and massive demonstrations. (Transcripts, pp. 4091, 4124). PLAN and OR achieved these goal in various ways. To communicate to PLAN members, Scheidler had a daily "hotline" for members to call, where times and locations of protests were announced. (Transcripts, pp. 3949, 4128). PLAN also issued a regular newsletter, promoting future protest events as well as reporting the results of various organized PLAN activities. (*Id.*). Scheidler himself also gave "advice" to PLAN members through the hotline and newsletters, as well as through PLAN speaking events. For example, Scheidler instructed PLAN members to "case out" clinics to learn their layout and make clinic staff know that they were "vulnerable." (Transcripts, p. 3930). Scheidler also advised members, when at protests, to not obey orders of clinic personnel. When he visited local PLAN groups, Scheidler insisted that at least some of the members enter the clinic facility when they were engaged in a protest. (Transcripts, p. 3932). Through the use of PLAN newsletters, speaking events, and conventions, PLAN leadership supported illegal tactics, such as physically entering clinics and blocking procedure rooms. (Transcripts, p. 3941). In fact, Scheidler took pride in the fact that PLAN created the "lock and

block," where protestors physically lock their bodies to the doors of clinics or other large objects in front of clinic doors. (Transcripts, p. 4124).

The most significant organizing tool for defendants was the annual PLAN convention, was held in different cities across the country. Evidence was presented about the PLAN convention, and the resulting activities, for each year from 1985 until 1997. Only a select number of these conventions will be highlighted here.[2] For example, in 1985, at the PLAN convention in Appleton, Wisconsin, PLAN members agreed to create "a year of pain and fear in the abortion industry." (Transcripts, p. 4006). One step towards that goal was a planned "Christmas Truce," where PLAN members were to return to their home communities and write the reproductive health clinics in their area to inform them that during month of December they would have to "close or be closed" by protesters blocking their doors. (Transcripts, p. 4007). In Chicago, PLAN sent these letters to every single reproductive health clinic that provided abortions in the area. (*Id.*).

In 1989, at the PLAN conference in Livonia, Michigan, PLAN members organized clinic protests to occur in Farmington, Michigan during the conference. (Transcripts, p. 4108). Several hundred protestors closed the clinic in Farmington and the "success" of the protests was reported in the PLAN newsletter. (Transcripts, pp. 4109-12). In 1991, clinic protests occurred for weeks in Wichita, Kansas shortly after the

---

[2] Each year the PLAN conference occurred, PLAN organized protests closed the clinics in that area. In Chicago in 1988, PLAN conducted workshop trainings on "lock and block" that were used in Chicago that year. (Transcripts, p. 4100). In Jackson, Mississippi in 1990, three clinics were closed by protestors during the PLAN conference. (Transcripts, pp. 4114-19, 4255). In San Antonio, Texas in 1992, clinics in the area were closed daily by protestors while the PLAN convention occurred. (Transcripts, pp. 4130-31). All of these protests were reported on Scheidler's Hotline and in the PLAN newsletter, praising the involvement of PLAN members, after they occurred. (Transcripts, pp. 4101, 4255, 4131).

PLAN convention held there. (Transcripts, p. 4122). PLAN leadership were significantly involved in the planning and execution of these protests. (Transcripts, pp. 4258-59).

PLAN created a successful design for the organizing of these protests. First, the protest would be announced on Scheidler's Hotline and communicated through PLAN members. PLAN leadership usually visit the site of the protest before it occurred. After the protest and clinic closing occurred, the results would be reported in the PLAN newsletter. For example, in Wilmington, Delaware in April of 1986, Scheidler entered, without permission, a reproductive health clinic with three other PLAN members and stated he was "casing the place." Even though he was asked to leave, he roamed throughout the clinic. (Transcripts, pp. 4036- 39). The next day, a protest occurred and PLAN members entered the clinic and caused considerable property damage by destroying equipment. (Transcripts, p. 633). PLAN reported this protest in its newsletter and other public relations materials and described it as a "fun time." (Transcripts, p. 4039). This same pattern occurred in Pensacola, Florida in March of that same year. (Transcripts, p. 3914). Members of the PLAN Leadership Council met in Pensacola and discussed how an "invasion" of this particular clinic could be orchestrated. It was agreed that some members would enter the waiting room of the clinic and others would enter the clinic through the back door. (Transcripts, p. 4012). The next day, the clinic was invaded by protesters, who "trashed the place," causing serious damage to surgical equipment and other medical supplies. The protesters were arrested. (Transcripts, pp. 4013-25). PLAN continued to use this same pattern of organizing, communication, and protest to close clinics throughout the country, as seen in New York City in 1988; Chicago in 1984, 1989, and 1996; Houston, Texas in 1990; and Dobbs Ferry, New York in 1991. (Transcripts, pp. 3996, 4095, 4113-14, 4119, 4190, 4256). The jury heard evidence tending to show that the objectives of the defendants at various protests included peaceful protest, informational picketing and leafleting, and acts of passive resistance in

combination with intimidation (including violence and threats of violence) to stop abortions.

After reviewing the evidence, the jury returned a verdict for the plaintiffs on their civil RICO claims. In particular, the jury found 21 acts or threats involving extortion against patients, prospective patients, doctors, nurses, and/or clinic employees in violation of federal law, 25 in violation of state law, and four acts or threats of physical violence to persons or property. Defendants were found liable for $54,471.28 in monetary damages to Summit Women's Health Organization and for $31,455.64 in monetary damages to Delaware Women's Health Organization.

Since the trial was completed, both defendants and plaintiffs have filed various motions as steps towards bringing this case to its conclusion. In order to expedite this process, this court held a hearing on the issue of injunctive relief in July of 1998. This court now addresses all remaining motions in this case.

Analysis

I. Decertification of the Classes

A. Decertification of NOW

Defendants argue that NOW should be decertified as the class representative for NOW members and non-NOW members because NOW lacks standing as an association. Citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), the Defendants argue that the testimony of four anonymous female witnesses at trial showed that individual participation of NOW members and non-NOW members was required to prove their claim, thus violating the third criteria for associational standing. (Dft's Corrected Motion for Decert., pp. 5, 12-13).

This court in a previous decision in this case found that NOW had associational standing under the *Hunt* test. *NOW v. Scheidler*, 897 F. Supp. 1047, 1068-69 (N.D. Ill. 1995), citing *Hunt*, 432 U.S. at 343. In particular, the court found that NOW

met the third criteria of the *Hunt* test, i.e. that the claim and the relief do not require individual participation in the lawsuit, for NOW was only suing for injunctive relief, an appropriate form of relief for an association to seek. *NOW v. Scheidler*, 897 F. Supp. 1047, 1068- 69 (N.D. Ill. 1995), citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The court stated in that opinion:

"It may be necessary for at least some of NOW's membership to testify as to their impediments in receiving treatment at abortion clinics; however, the limited nature of this proof will not force NOW to violate Hunt's third prong." 897 F. Supp. at 1070.

The resulting testimony of the four anonymous witnesses at trial did not violate the third prong of *Hunt* test and therefore NOW maintains standing.

B. Decertification of the Clinic Class: Summit and the Wisconsin litigation

Defendants argue that Summit, one of the representatives of the Clinic Class, is precluded from bringing the claims on behalf of the class because of a dismissal with prejudice of claims brought on similar facts in Wisconsin state court. (Dft's Motion for Decert., p .3; Dft's Corrected Memo in Support of Decert., p. 4 fn.8). Therefore, the Defendants argue, under Wisconsin law and the full faith and credit clause, 28 U.S.C. § 1738, Summit is subject to claim preclusion.[3]

On August 25, 1997, Summit (under the auspices of the National Women's Health Organization of Summit, Inc.), along

---

[3] The Defendants argue that DWHO is also precluded because DWHO is in privity with Summit. However, there is no mention of DWHO, a Delaware-based clinic, anywhere in the papers of the Wisconsin case, nor have the Defendants present any evidence connecting DWHO to Summit. Therefore, the court will only consider the Defendants' claim preclusion arguments as they apply to Summit. After the trial was over and the instant motions were briefed, the Scheidler defendants sought to reopen the record, presumably to attempt to demonstrate "privity." That request was denied as untimely.

with the Milwaukee Women's Medical Services and Planned Parenthood of Wisconsin, filed state claims alleging invasion of privacy, assault, and public and private nuisance by Joseph Scheidler, PLAN, and other defendants in the present case, and demanded temporary and permanent injunctive relief, as well as compensatory and punitive damages. (Dft's App. to Post-Trial Motions, Vol. I, Ex. A). On September 22, 1997, an Amended Complaint was filed that did not include Summit as a plaintiff nor Joseph Scheidler nor PLAN as defendants. (Dft's App. to Post-Trial Motions, Vol. I, Ex. L). Counsel for Summit and Scheidler signed a stipulation and order for dismissal on December 1, 1997, that stated that the claims were dismissed with prejudice and a final order for dismissal was signed by Wisconsin Circuit Court Judge Charles Kahn. (Dft's App. to Post-Trial Motions, Vol. I, Ex. R). However, on February 24, 1998, just three days before the present case was to go to trial, Summit presented a motion to the Wisconsin Circuit Court to reopen and modify the stipulation and order for dismissal. (Dft's Appl to Post-Trial Motions, Vol. I., Ex. T). In response to the motion and a hearing on the matter, on February 26, 1998, Judge Kahn signed an order for dismissal that dismissed Summit's claims against Scheidler with prejudice, but with the stipulation that, "it is not the intent of this court that this order have any effect upon *National Organization for Women, Inc., et al. v. Joseph M. Scheidler, et al.*, Case No. 86 C 7888 in the United States District Court for the Northern District of Illinois, Eastern District." (Dft's Appl. to Post- Trial Motions, Vol. I., Ex. BB). On May 4, 1999, the Wisconsin Appellate Court reversed Judge Kahn's order and the cause has been remanded. *Milwaukee Women's Medical Service, Inc. v. Joseph Scheidler et al.*, No. 98-1139-FT, May 4, 1999 (Dft's Motion for Leave to Add to the Record, Attachment A).

Res judicata is an affirmative defense that must be raised or lost and the burden of establishing preclusion is upon the party claiming it. Fed. R. Civ. P. 8(c); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §§ 4404, 4405. Counsel for Scheidler did not properly raise the defense prior to

trial. The original dismissal in the Wisconsin case was filed December 1, 1997. However, in the over 500 pages Defendants filed in February, 1998 with the Final Pretrial Order, the Wisconsin litigation was never mentioned. Counsel for Scheidler did not inform the court of the Wisconsin litigation and its dismissal until February 19, 1998, in Defendant's Motion for Continuance of All or Part of the Final Pretrial Conference or Trial. (Dft's Mot. for Cont., p. 14). In that motion, counsel for Defendant only states that claims filed by Summit against Scheidler in Wisconsin Circuit Court were dismissed with prejudice. (*Id.*). However, the counsel for Defendant never informed or even stated to this court what the Wisconsin state claims were. At the Final Pretrial Conference, Counsel for Defendant mentioned the litigation in Wisconsin again, but only as a support for his argument for continuance of the Final Pretrial Conference and not as an argument for res judicata. (Final Pretrial Conference Transcripts, February 20, 1998, pp. 10-12). When asked repeatedly and directly by the court what the Wisconsin litigation had to do with the present case, Counsel did not answer the question. (Final Pretrial Conference Transcripts, February 20, 1998, pp. 9-16). The court clearly stated to counsel that if he was requesting an order, he should submit it to the court in writing.[4] Neither before nor during trial did Counsel ever submit to this court any coherent statement of the position now asserted nor proffer any orders from the Wisconsin Circuit Court stating that there was a final judgment in that case. Therefore, the defendants did not timely raise the affirmative defense of res judicata and the defense is now lost.

---

[4] After continuous questioning of counsel, the court stated, "Mr. Brejcha, I have urged you since my involvement in this case not to mention matters to this court. That if you have something that you think is sufficiently important that affects the proceedings in this court, to put it in writing. The Federal Rules of Civil Procedure make it quite clear that a request for an order must be in writing except if the request is made during a hearing. So mentioning things in passing in court is of no particular moment." (Final Pretrial Conference Transcripts, February 20, 1998, pp. 15-16).

Even if Counsel for Defendant had timely raised the res judicata defense before trial, Summit would not have been precluded from litigating these claims in federal court, for Judge Kahn of the Wisconsin Circuit Court ordered in his stipulation that the order for dismissal was not intended to affect the present case. (Dft's App. to Post-Trial Motions, Vol. I., Ex. BB). The most this court would have done is stayed the proceedings until the appeal of the Wisconsin state court judgment had been decided.[5] *Rogers v. Desiderio*, 58 F.3d 299, 302 (7th Cir. 1995) (finding that when a state court decision that could have claim preclusive effects on a federal case is appealed, the federal court should stay proceedings until the state case has reached a conclusion). When a state court has reached a final judgment that would have claim preclusive effects over pending federal litigation, the federal court must respect that judgment. *Majeske v. Fraternal Order of Police, Local Lodge No. 7*, 94 F.3d 307, 312 (7th Cir. 1996). The Full Faith and Credit Act provides in part that the "judicial proceedings" of any state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such state." 28 U.S.C. § 1738. The Act "thus directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Electric Industrial Co. v. Epstein*, 116 S. Ct. 873, 877 (1996), quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982). Federal courts must accept that state's rules for determining the effect of the judgment. *Matsushita Electric*, 116 S. Ct. at 877.

Wisconsin has adopted a transactional approach to determining claim preclusion which extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected

---

[5] However, it is unclear from the papers submitted by Defendants if the Wisconsin trial court dismissal and stipulation was appealed before or after the trial in this present case.

transactions, out of which the action arose." *Northern States Power Co. v. Bugher*, 525 N.W.2d 723, 728-9 (1995), citing Restatement (Second) of Judgments § 24 (1982). However, under Wisconsin law, trial courts have broad discretion in crafting dismissals. "[A] trial court may totally accept or reject a stipulation presented by the parties for its approval." *Phone Partners Ltd. Partnership v. C.F. Communications Corp.*, 196 Wis.2d 702, 709, 542 N.W.2d 159, 161 (Ct.App.1995). Once the court approves a stipulation, it becomes the court's judgment. *Id.;* Wis. Stat. § 806.07(1). Therefore, if Defendants had raised their res judicata argument before the trial in this case, this court would have recognized the final judgment of the Wisconsin trial court and would not have found that the dismissal had a preclusive effect on the present case, since the stipulation specifically states that the dismissal has no effect on the present case. Since the trial and verdict in the present case, the Wisconsin Supreme Court has reversed and remanded Judge Kahn's dismissal and stipulation, stating that the Wisconsin trial court abused its discretion in approving the stipulation. *Milwaukee Women's Medical Services,* No. 98-1139-FT, May 4, 1999, p. 8. However, at the time that this court would have had to decide the preclusive effects of the Wisconsin case, this court would have had to respect the judgment of the Wisconsin trial court. It was not, and is not, the place of this court to go back and determine the legal validity of the Wisconsin trial court, but instead to respect the judgment of that court. *Kremer,* 456 U.S. at 482.

II. Rule 15(b): Amend Complaint to Conform to Evidence

The plaintiffs have moved under Fed. R. Civ. P. 15(b) to amend their complaint to include a claim arising under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248(a) ("FACE"), and state law extortion, assault, trespass, and tortious interference with prospective economic advantage. (Pls' 15(b) Motion, p. 2). The plaintiffs argue that the factual issues that underlie these claims were presented at trial. In particular, the plaintiffs assert that the defendants presented several pieces of

evidence themselves that would support FACE and state law tort claims and that defendants did not object when plaintiffs presented similar evidence at trial. (Pls' 15(b) Reply, pp. 2, 4). This evidence is the same evidence that supports the predicate acts of RICO upon which the jury found the defendants liable. (Pls' 15(b) Reply, p. 5). That is, no doubt, the reason that defendants failed to object.

The defendants vigorously respond that they objected to the use of any evidence that was outside of the pleadings at trial. (Dfts' Resp. to Pls' 15(b), p. 2). Also, any evidence that they admitted that supports a FACE or a state law tort claim was admitted for another purpose. (*Id.*). Finally, the defendants argue that amending the complaint to include FACE and state law tort claims would be prejudicial to the defendants, for the jury was not instructed on FACE or state law tort claims and thus no individuals were named in the jury findings. (Dfts' Resp. to Pls' 15(b), pp. 6-7).

A. Standard for 15(b)

Rule 15(b) states in part:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in al respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; . . ."

Fed. R. Civ. P. 15(b)

Rule 15(b) creates a system in which "the complaint does not fix the plaintiff's rights but may be amended at any time to conform to the evidence." *Duckworth v. Franzen*, 78 F.2d 645, 649 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986). The Intent of Rule 15(b) is "to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *In re Prescott*, 805 F.2d 719, 725 (7th Cir. 1986),

quoting *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982). A Rule 15(b) amendment can occur either before, during, or after trial. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1491 (1990).

The key factor in determining whether an amendment should be allowed is whether the issue has been tried with the express or implied consent of the parties. *Winger v. Winger*, 82 F.3d 140, 144 (7th Cir. 1998); *Ippolito v. WNS, Inc.*, 864 F.2d 440, 456 (7th Cir. 1988); *Prescott*, 805 F.2d at 725. The test for this consent is "whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment." *Prescott*, 805 F.2d at 725, quoting *Hardin*, 691 F.2d at 456 (10th Cir. 1982). For an opposing party to give implied consent, the party must either have not made the objection that the evidence presented at trial was outside of the pleadings, or the opposing party must have introduced the evidence his or herself. *Prescott*, 805 F.2d at 725. Therefore, Rule 15(b) requires the opposing party to show that he or she will be prejudiced by the amendment. Wright, Miller Kane, Federal Practice and Procedure: Civil 2d § 1495 (1990). The decision as to whether the issue in the amendment was actually tried by implied or expressed consent is within the district court's discretion. *Ippolito*, 864 F.2d at 456.

While Rule 15(b) is quite liberal, that does not mean that a motion to amend a complaint will automatically be granted. "[A] court will not imply consent to try a claim merely because evidence relevant to a properly plead issue incidentally tends to establish an unpleaded claim." *Ippolito*, 864 F.2d at 456, quoting *Quillen v. International Playtex, Inc.*, 734 F.2d 1258, 1272 (7th Cir. 1984). Furthermore, if the evidence presented by the opposing party that allegedly demonstrates consent is also relevant for another purpose, then the admission of the evidence is not considered consent and the pleadings should not be amended under 15(b). Wright, Miller & Kane, § 1493 (1990); see also, *Gorlikowski v. Tolbert*, 52 F.3d 1439 (7th Cir. 1995).

Rule 15(b) also does not apply when the evidence does not support the theory upon which the court charged the jurors. *Jackson v. Crockarell*, 475 F.2d 746, 748 (6th Cir. 1973). Finally, the opposing party can defend against a 15(b) motion when the opposing party objected to the evidence during trial because it went beyond the scope of the pleadings. *Prescott*, 805 F.2d at 725.

B. Implied Consent

The plaintiffs argue that the defendants gave implied consent to the amended claims because they presented evidence themselves that supported the FACE and state law tort claims. (Pls' 15(b) Reply, p. 4). However, the court finds that the evidence to which the plaintiffs allude applies to the conspiracy claim and only incidentally to the FACE and state law tort claims. Granted, several of the defendants' witnesses testified to observing or participating in various protests in front of class clinics. However, that evidence was presented in the defense of their actions as free speech and not as an act of conspiracy. Presenting that defense does not consent to federal claims of FACE or state law tort claims. Therefore, this evidence was relevant to another issue in the case.

More troubling for the court, however, is that the evidence that plaintiffs argue supports FACE and state law tort claims does not support the theory that was presented to the jury. In order for the jury to find the defendants liable under RICO, plaintiffs had to show that PLAN demonstrated conduct of an enterprise through a pattern of racketeering activity. *NOW v. Scheidler*, 1997 WL 610782,*6 (N.D. Ill. 1997), citing *Richmond v. Nationwide Cassel, L.P.*, 52 F.3d 640, 644-47 (7th 1995). The court instructed the jury that the plaintiffs had to show that PLAN was an enterprise that affected interstate commerce and that each defendant was associated with PLAN, was involved in operating and managing PLAN, and that each defendant's participation in PLAN was through some pattern of acts illegal under RICO. (Jury Instructions).

In contrast, under FACE, an individual may have criminal or civil penalties applied to them if that individual:

> "(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining, or providing reproductive health services . . .
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . ."

18 U.S.C. § 248(a)(1,3).

In the present case, the jury followed the verdict from and found that the defendants or other persons associated with PLAN had committed acts or threats of extortion, acts and attempts of conspiracy, acts or threats of violence, in the last ten years. (Transcript, April 20, 1998, pp. 5185-91). However, the jury did not state which defendants did these acts or when they occurred, only the total number of acts.[6] Evidence was presented at trial from before and after the enactment of FACE, so the court does not know which evidence the jury relied upon in its findings. Since individuals are not named in the jury's findings, the court does not know who was found to have the requisite intent for FACE of the state law tort claims. Since the clinic incidents from across the country were presented and the plaintiffs have not stated which state law they claim, the court

---

[6] The jury found 21 acts or threats of extortion in violation of federal law; 25 acts or threats of extortion under state law; 25 attempts or conspiracy to do any of the previously mentioned acts; and 4 acts or threats of physical violence to persons or property. The jury also found that these acts occurred within the last ten years and proximately caused injury to the business and property of the two clinics and the NOW class members. None of the jury's findings was based solely on blockades of clinic doors or sit-ins within clinics. (Transcript, April 20, 1998, pp. 5183-91).

also does not know which state law to apply in the amended state law tort claims.[7] Therefore, the court finds that the plaintiffs' motion to amend the complaint to conform to the evidence is denied.[8]

Finally, as discussed later, there was some evidence presented after trial as to conduct at clinics after FACE was enacted. That evidence was offered to rebut defendants' claim that injunctive relief was unnecessary because FACE provided plaintiffs with a more focused remedy for addressing clinic blockades. That evidence was limited in nature and fails to establish a basis for the injunctive relief sought.

III. Phase II Damage Trials

In the plaintiffs' Motion in Support of Phase II Trials for Absent Class Members, the plaintiffs argue the parties agreed before trial to conduct the litigation of this case in two phases: the first phase ("Phase I") would determine if the defendants were liable under civil RICO and would feature two representative clinics for the plaintiff clinic class. Phase I of the trial was conducted in March and April of 1998 and the jury returned with a verdict in favor of the plaintiffs. The proposed second phase of the litigation ("Phase II") would be a series of damage trials at which other members of the plaintiff clinic class would have an opportunity to prove their individual monetary damages. (Pl's Motion for Phase II Reply, pp. 2-3). According to the plaintiffs, the concept of two phases of trial has ruled this case through all the stages of litigation: from discovery and the notice to class members to the final pre-trial order and the final pre-trial conference. (*Id.*). Citing the *Manual for Complex Litigation,* the plaintiffs argue that the two-phase model for complex class actions is common. *Manual for Complex Litigation,* § 33.28 at 328, 330 (3d ed.1995); see also

---

[7] The issue will be addressed in more depth in the section on the damage trials.

[8] Defendants' 12(e) Motion for a More Definite Statement is denied as moot.

Hilao v. Estate of Marcos, 103 F.3d 767, 782 (9th Cir. 1996). Finally, the plaintiffs state that the defendants never objected to the bifurcation of the liability and damages issues for trial and in fact agreed to the two stages of trial at one of the pretrial conferences. (Pl's Motion for Phase II Reply, p. 5).

The answer to the question of whether to have separate trial for litigation and damages is left to the discretion of the trial court based upon the circumstances of the case before it. Fed. R. Civ. P. 42(b); *In re Bendectin*, 857 F.2d 290, 308 (6th Cir. 1988), cert. denied, 488 U.S. 1006 ("Rule 42(b) is sweeping in its terms and allows the court, in its discretion, to grant a separate trial of any kind of issue in any kind of case."); see also *Davis v. Freels*, 583 F.2d 337 (7th Cir. 1978); Wright & Miller, Federal Practice and Procedure: Civil 2d § 2388, p. 481 (1995). While separate trials for separate issues in one lawsuit is not usual in large class action suits, a two-phase model has been used to promote efficiency. See *Sterling v. Velsicol*, 855 F.2d 1188 (6th Cir. 1988); *Manual for Complex Litigation*, § 33.28. However, this model has not been used as frequently in RICO litigation, for the liability and damages questions are not so easily divided. *Manual for Complex Litigation*, §§ 33.82, 33.83, 33.86. A motion for bifurcation of the litigation is properly made at the pretrial conference. Wright & Miller, Federal Practice and Procedure: Civil 2d § 2388, p. 483 (1995); see *Krueger v. New York Telephone Co.*, 163 F.R.D. 446 (S.D.N.Y.1995).

In the present case, the plaintiffs argue that at the discovery stage they first argued for a two-phase trial. In the plaintiffs' Brief in Opposition to Defendants' Motion for Leave to File Interrogatories, the plaintiffs cited several cases that were two-phase class action litigations. See *Robertson v. National Basketball Association*, 67 F.R.D. 691, 700 (S.D.N.Y.1975); *Gardner v. Awards Marketing Corp.*, 55 F.R.D. 460, 463 (D. Utah 1972). (Pl's Motion for Phase II Reply, Ex. B). However, these cases were used in the support of the argument that defendants could not obtain discovery of absent class members

before the class was certified, not to support an argument for the bifurcation of the case. The plaintiffs did not formally present a motion for a two-phase trial before the court at that time.

The plaintiffs argue that the Notice of Class Determination, approved by this court and sent to all women's health centers in the United States who were potential plaintiff clinic class members, included language that recognized that this litigation would occur in two phases. Part F of the Notice, titled "How to Stay in the Lawsuit," states,

> "After the first phase of the trial, if Plaintiffs prevail, you may be required to provide information or even to testify in a trial or other proceeding designed to establish the amount of damages, if any, that you suffered as a result f the Defendants' acts."

(Pl's Motion for Phase II, Ex. C).

While the notice does leave open the option for a second phase of litigation, the notice in and of itself does not establish that the court ruled on the issue or that the parties consented to a two-phase trial.

In the Final Pre-Trial Order, the plaintiffs argue that a two phase trial was discussed. In the Plaintiffs' Trial Brief, the plaintiffs argued that damages for the plaintiff clinic class should be determined in a Phase II trial. (Pl's Motion for Phase II Reply, p. 4, citing Pl's Trial Brief, p. 11). Relying on General Rule 5 of the Northern District of Illinois, Standing Order on Pretrial Procedures in Civil Cases, the plaintiffs argue that the trial briefs are incorporated into the Final Pre-Trial Order and are thus binding upon the parties. (Pl's Motion for Phase II Reply, pp. 4-5). The plaintiffs state that the defendants did not object to the Final Pre-Trial Order and this two-phase model for the trial was agreed to by the defendant parties at the Final Pre-Trial Conference.[9]

---

[9] The exchange relied upon by plaintiffs to demonstrate that defendants

There are several problems with the plaintiffs' argument. First, the discussion in the Plaintiffs' Trial Brief of a two phase trial was presented only as a "suggestion" to the court and consisted of only one paragraph in a fifteen page brief. The court does not consider that a formal presentation of the issue to the court. While the Plaintiffs' Trial Brief was attached to a draft of the Pre-Trial Order, the Final Pre-Trial Order that was signed and entered did not contain a copy of the Plaintiff's Trial Brief. However, within the signed and entered Final Pre-Trial Order is the statement, "6. The parties do not agree that the issues of liability and damages of the class member clinics should be bifurcated for trial." (Final Pre-Trial Order, p. 5). The plaintiffs argue that the language only refers to the two lead plaintiff clinics in the case, Summit and DWHO, but there is no additional language in the Final Pre-Trial Order to support such an argument. All language within the Final Pre-Trial Order is binding on the parties at trial. General Rule 5.00 of the Northern District of Illinois, Standing Order Establishing Pretrial Procedure, Section 6(d). Therefore, the parties did not consent to a two-phase trial.

As to the so-called agreement by defendants to a two-phase trial at the Final Pre-Trial Conference, the answer of "Right" by one of the defense counsel and the silence of other defense counsel to the comment by plaintiffs' counsel on the scope of the trial is not considered consent by this court. The court does not consider that sidebar discussion a formal presentation of the

---

agreed to a two-phase trial occurred at the Final Pre-Trial Conference:

THE COURT: Now, are there any other things that we need to take up?

MS. CLAYTON: Real quick matter. I think it goes without saying that the scope of this trial is the common question of the class action and the damages of the two lead plaintiffs, and other issues of absent class members will be reserved for later. We have never actually said that, but I assume that was the scope of it.

MR. CRAIN: Right.

issue of the bifurcation of the trial to the court and the court did not rule on the issue of a two-phase trial at that time.

This court has made it very clear to all parties in this case that issues that affect the proceedings of this case must be placed in writing. (Final Pre-Trial Conference Transcripts, February 20, 1998, pp. 15-16; *supra,* fn. 2). The Federal Rules require it and the history of the proceedings in this case demanded it. The plaintiffs did not make a formal motion to bifurcate this litigation until after trial. A district court does not abuse its discretion when it denies a *sua sponte* motion for bifurcation when the parties did not make a motion for bifurcation prior to trial. *Bunch v. Bullard*, 795 F.2d 384, 390-91 (5th Cir. 1986). Therefore, the plaintiffs' motion in support of Phase II trials is denied.

IV. Injunctive Relief

A continuous issue in this case has been whether plaintiffs are able to petition for injunctive relief under civil RICO. Now that the trial is over and the monetary damages have been determined,[10] the issue of injunctive relief for the plaintiffs is the last issue to be addressed.

A. Injunctive Relief Available under RICO

Section 1964(a) of RICO, entitled "Civil Remedies," states:

> "The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to,

---

[10] 18 U.S.C. § 1964(c) provides that any civil plaintiff shall recover treble damages and a reasonable attorney's fee. Therefore, the monetary damages awarded to Summit and DWHO are trebled to $163,413.84 and $94,366.92, respectively.

> prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons."

This court found in an earlier opinion in this case that private parties may petition the court for injunctive relief for civil RICO violations. *NOW v. Scheidler*, 897 F. Supp. 1047 (N.D. Ill. 1995). Granted, the circuit courts are split on this issue. *Conkling v. Turner*, 18 F.3d 1285, 1296 (5th Cir. 1994) (declining to reach the issue, but noting the split in the circuits). The Seventh Circuit also has not ruled on this issue. However, this court is persuaded by the rationale of the opinions of the other circuits. *Lincoln House, Inc. v. Dupre*, 903 F.2d 845 (1st Cir. 1990) (declining to reach the issue, but assuming that the district court could grant equitable relief); *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34 (1st Cir. 1986) (finding that in order to obtain injunctive relief, plaintiff must show irreparable injury, substantial likelihood of success on the merits, a weighing of the equities in the plaintiff's favor, and a public benefit); *Humana, Inc. v. Avram A. Jacobson, M.D., P.a.*, 804 F.2d 1390 (5th Cir. 1986) (same); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (implying that equitable relief may be available under RICO); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983) (reasoning that Congress did not intend "to deprive the district court of its traditional equitable jurisdiction" to grant injunctive relief for alleged violations of RICO statute); see also Batista, Civil RICO Practice Manual 169 (1987), § 6.13 – The Availability of Injunctive Relief. This court also must follow the Supreme Court's instruction that "RICO is to be read broadly" and that the very purpose of the statute is to "supplement and strengthen the means already available for fighting crime." *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 498 (1985).

While an injunction may be an option under civil RICO, any possible injunction must pass muster under the First Amend-

ment. The Supreme Court has noted in this very case that, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaged in protected expression." 510 U.S. 249, 264 (1994) (J. Souter, concurrence). As this court examines the potential of an injunction, the court will follow the Seventh Circuit's instruction to address, "if necessary, . . . which of the defendants' activities, . . . are protected by the First Amendment to the United States Constitution." *NOW v. Scheidler*, 25 F .3d at 1053.

B. Standard for Injunctive Relief

A party seeking a permanent injunction must show that: 1) it has prevailed on the merits of its claim; 2) it has no adequate remedy under law; 3) the balance of equities tips in its favor, and 4) the issuance of the injunction serves the public interest. *Plummer v. American Institute of Certified Public Accountants*, 97 F.3d 220, 229 (7th Cir. 1996). Obviously the plaintiffs met the first criteria when the jury returned a verdict finding the defendants liable under civil RICO. (Transcripts, April 20, 1998, pp. 5183-5191). The final three criteria must be examined.

1. No Adequate Remedy Under Law

Since RICO expressly provides for injunctive relief, this factor does not apply, and thus the plaintiffs do not have to show that they lack an adequate remedy under law. When Congress expressly authorizes injunctive relief to enforce provisions of a statute, a party need not show the lack of a adequate legal remedy. *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 740 F.2d 566, 571 (7th Cir. 1984); *Pepsico, Inc. v. Redmond*, 1996 WL 3965 at *28 (N.D. Ill. 1996); *Special Education Services v. RREEF Performance Partnership-I, L.P.*, 13 A.D.D. 683 (N.D. Ill. 1995); *North Shore- Chicago Rehab. Inc. v. Village of Skokie*, 827 F. Supp. 497, 509 (N.D. Ill. 1993); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 822 (N.D. Ill.

1988); *Wilk v. American Medical Association*, 671 F. Supp. 1465, 1484-85 (N.D. Ill. 1987). The Seventh Circuit has held that for a statutory injunction, "the moving party only needs to show that there is some reasonable likelihood of future violations..." *Commodity Future Trading Commission v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979). As we shall see below, there is more than adequate evidence to make this showing.

2. Balancing the Equities and Serving the Public Interest

The threatened injury to the two classes of plaintiffs outweighs the potential harm to the defendants by an injunction. The evidence presented both at trial and at the injunction hearing shows that the defendants have a history of unlawful conduct. The jury found that in the last ten years, the defendants committed repeated acts and threats of extortion against patients, prospective patients, and clinic personnel as well as acts and threats of violence to persons and property across the United States. (Transcripts, April 20, 1998, pp. 5187-88). These acts crossed the line of expression into the realm of threatening conduct. The Supreme Court has upheld injunctions against individual protestors and organizations of protestors of reproductive health clinics when there is a history of prior unlawful conduct by the protestors. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374 fn. 6 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 762, 764 fn. 2 (1994). The Court in *Madsen* found that there was a significant governmental interest in the injunction in order to ensure public safety and order, to promote free flow of traffic on the streets and sidewalks, to protect property rights, and to protect a woman's freedom to seek pregnancy-related services. *Madsen*, 512 U.S. at 762. Considering the evidence relied upon by the jury in this case, and the evidence presented to the court in the injunction hearing on the actions of the defendants, the governmental interests are significant enough to justify a tailored injunction.

C. The Necessity of an Injunction in light of FACE

This court held a post-trial hearing to address the issue of whether the passage of FACE has addressed the defendants' conduct and thus has eliminated the need for an injunction in the present case. FACE was passed by Congress in May of 1994. At the hearing, evidence was presented of defendants' illegal activity since the passage of FACE. For example, plaintiffs presented evidence of butyric acid being placed in a reproductive health clinic in Orlando, Florida in May of 1998 during Operation Rescue's national rescue week in Orlando as well as videotape evidence of defendants blocking clinic doors and physically accosting plaintiffs as they attempted to enter a clinic in Chicago in August of 1996. (Transcripts, June 30, 1998, pp. 45-46, 92-95). Evidence was also presented of "lock and blocks" at a clinic in Milwaukee where defendants physically locked their bodies to automobiles that were parked in front of the clinic's doors, making it impossible for clinic staff and patients to enter the clinic. (Transcripts, June 30, 1998, pp. 97-98). These "lock and blocks" have been continuing in Milwaukee on an almost weekly basis since May of 1994. (Transcripts, June 30, 1998, p. 98). Plaintiffs' witnesses testified at the hearing that various injunctions under FACE have been sought and implemented in order to address these activities, but the illegal conduct of the defendants continues as defendants cross state lines to avoid the jurisdiction of the various injunctions. (Transcripts, June 30, 1998, pp. 55, 73). Moreover, there was testimony supporting the conclusion that blitzkrieg tactics were sometimes used to swoop in on a clinic without warning so as to overwhelm available law enforcement personnel. (Transcripts, p. 4091).

This court finds that the defendants, as an enterprise, have continued to engage in illegal behavior that violates civil RICO since the passage of FACE and thus there is a significant governmental interest in ordering an injunction to enjoin such illegal conduct. The injunction should be national in scope, for plaintiffs have shown that injunctions that are geographically

limited do not prevent defendants from engaging in illegal conduct. Where the need for an injunction is nationwide, the courts have consistently held that an injunction can and should be nationwide in scope both in the abortion protest context, *United States v. Dinwiddie*, 76 F.3d 913, 929 (8th Cir. 1996); *United States v. Roach*, 947 F. Supp. 872, 878 (E.D.Pa.1996); *United States v. McMillan*, 946 F. Supp. 1254, 1270 (S.C.Miss.1995); as well as in other contexts. *United States v. Carson*, 52 F.3d 1173, 1184-85 (2d Cir. 1995); *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987); *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985). The Eight Circuit in *United States v. Dinwiddie* upheld a national permanent injunction against an individual anti-abortion protestor. The court in *Dinwiddie* found that not only was there a significant governmental interest in protecting the particular clinic staff and patients involved in the case, but in protecting the staff and patients of other reproductive health facilities throughout the country from the illegal conduct of the defendant. *Dinwiddie*, 76 F.3d at 929. The court recognized that the defendant "could easily frustrate the purpose and spirit of the permanent injunction simply by stepping over state lines and engaging in similar activity at another reproductive health facility." *Id.*, quoting the district court, 885 F. Supp. 1286, 1296 (W.D.Mo.1995). Considering the evidence of defendants' illegal conduct across the United States, the reasoning of *Dinwiddie* applies squarely to this case.

D. Conduct versus Speech

The defendants argue that an injunction would be a direct ban on protected speech and thus would be unconstitutional. (Dfts' Memo in Opp. to Inj., pp. 7- 8). However, the Supreme Court has held that there is a distinction between speech and conduct. While speech is constitutionally protected, if the speech is used to threaten, incite or organize criminal acts, the speech loses its protection. *Madsen*, 512 U.S. at 773 (threats are proscribable under the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (speech infused with violence are

indistinguishable from physical threats); *R.A.V. v. City of St. Paul,* 505 U.S. 377, 383, 386 (1992) (fighting words are not protected by the First Amendment). See also *United States v. Wilson,* 154 F.3d 658 (7th Cir. 1998) (an illegal course of conduct is not protected by the First Amendment merely because the conduct was carried out by speech).

The injunction restrains specific behavior of defendants that the courts have held are not protected: obstructing or interfering with the access to a reproductive health facility, *Schenck*, 519 U.S. at 367 n. 3; *Madsen*, 512 U.S. 759-61; trespassing, *Id.; Portland Feminist Women's Health Center v. Advocates for Life,* 859 F.2d 681, 684 (9th Cir. 1998); *Roach*, 947 F. Supp. at 878; damaging property, *Portland Feminist*, 859 F.2d at 684; and using violence or threats of violence, *McMillan*, 946 F. Supp. at 1254. The Seventh Circuit has distinguished between conduct and speech in the arena of anti-abortion protesting: "[Physically impeding entry to a reproductive health facility] goes beyond protest and interferes with the personal liberty and property rights of others. While it is expressive conduct, it is not protected by the First Amendment." *Wilson*, 154 F.3d at 663. The injunction still leaves open many avenues for defendants to express their anti-abortion beliefs. For example, the injunction does not enjoin protected actions such as peaceful picketing, public speeches, pamphleting, praying, or sidewalk counseling.[11]

E. Prior Restraint

The defendants argue that an injunction would be a prior restraint on speech, for it would have a chilling effect upon speech. (Dft's Memo in Opp. to Inj., p. 6). However, the Supreme Court has rejected this prior restraint argument in two cases involving injunctions against anti-abortion protestors. In *Madsen,* the Court held, "[n]ot all injunctions that may incidentally affect expression, however, are 'prior restraints' in

---

[11] See footnote 20, *infra*, for definition of sidewalk counseling.

the sense that the term was used in *New York Times Co. v. United States*, 403 U.S. 713 (1971) or *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980). Here, petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the . . . buffer zone." 512 U.S. at 764, fn. 2. In *Schenck*, once again the Supreme Court rejected the prior restraint argument, for the injunction left alternative channels of communication open to protestors and the injunction was issued because of the illegal conduct of the defendants, not because of the content of their expression. 519 U.S. at 374, fn. 6. The same is true in this case. The record shows systematic illegal conduct by the defendants against the classes of plaintiffs. The injunction still allows a variety of options for the defendants to express their views. This case is about political means and ends. While the political ends of the defendants-to convince the public of the need to protect what they characterize as "unborn children"-are constitutionally protected by the First Amendment, a number of their means-destroying property and threatening violence-are not.

V. The Injunction

This case has come to the Court on the request of the Certified Plaintiff Classes[12] and the members of NOW whom NOW represents for a Permanent Nationwide Injunction.

The Court having heard the evidence presented at the trial of this case from March 5, 1998 through April 14, 1998, after

---

[12] The Plaintiff Class of Clinics and the Plaintiff Class of Women are defined in this Court's Order dated March 28, 1997 as follows:

The Clinic Class: The class of all women's health centers in the United States at which abortions are performed.

The NOW Non-Member Class: The class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities.

which a jury ruled in Plaintiffs' favor on all issues; and having heard additional evidence, without any advisory jury, from June 30, 1998 through July 2, 1998;

The Court hereby finds and orders:

1. The Defendants[13] have violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq., by operating an enterprise, the Pro Life Action Network ("PLAN"), through a pattern of numerous, repeated acts of racketeering that interfered with the Plaintiff Clinics' right to provide medical services, including but not limited to abortions, and the right of NOW members and the Plaintiff Class of women to obtain those services.

2. The evidence presented at trial established a likelihood that similar illegal conduct would be committed in the future by the Defendants and/or others acting in concert with them.

The Conduct Enjoined

3. Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, a/k/a Operation Rescue National (the "Defendants"), and each of their officers, directors, agents, representatives, servants, employees, attorneys and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly: [14]

a. interfering with the right of any member of the Certified Class of Plaintiff Clinics to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of

---

[13] Randall A. Terry entered into a Settlement Agreement with Plaintiffs prior to trial. This Order does not apply to him.

[14] *Madsen v. Women's Health Center*, 512 U.S. 753, 775 (1994); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 687 (9th Cir. 1988); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3rd Cir. 1989).

women to avail herself of the Plaintiff Clinics' services (included but not limited to abortion services), by:

(1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic[15];

(2) trespassing on the premises or the private property of any Plaintiff Clinic[16]

(3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic;[17]

(4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic;[18]

b. aiding, abetting, inducing, directing, or inciting any of the acts enumerated in subsection a. of this paragraph (the "Acts") through any of the Defendants or through others;[19]

c. operating an enterprise through any of the Acts described above.

4. This injunction does not prohibit or preclude expressive activities that are constitutionally protected, including but not limited to the following conduct:

---

[15] *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 367 n. 3 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 759-61 (1994).

[16] *Schenck*, 519 U.S. at 367 n. 3 (1997); *Madsen*, 512 U.S. at 759 (1994); *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 684 (9th Cir. 1988); *United States v. Roach*, 947 F. Supp. 872, 878 (E.D. Penn. 1996).

[17] *Portland*, 859 F.2d at 684 (9th Cir. 1988).

[18] *United States v. McMillan*, 946 F. Supp. 1254 (S.D. Miss. 1995).

[19] *Schenck*, 519 U.S. at 367 n. 3 (1997); *Madsen*, 512 U.S. at 761 (1994).

a. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic;

b. Making speeches on public property;

c. Speaking to individuals approaching the clinic;[20]

d. Handing out literature on public property; and

e. Praying on public property.[21]

5. This injunction shall bind Defendants Joseph Scheidler; Andrew Scholberg; Timothy Murphy; the Pro-Life Action League, Inc.; and Operation Rescue, a/k/a Operation Rescue National, and each of their officers, agents, servants, employees and attorneys, and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN. Notice of this Order may be given to each such person by hand delivery, First Class Mail, Certified Mail, facsimile, or by reading a copy of this order aloud. Such reading may be accomplished by any representative of a Plaintiff Clinic or by any federal, state or local law enforcement personnel.

6. This injunction shall be enforceable by the U.S. Marshall Service and by any other federal, state or local law enforcement authority, each of whom is hereby authorized to arrest any person who appears to be in disobedience of this injunction. The arrestee may be taken before any federal judge or magistrate in the jurisdiction in which the arrest is made. Violation of this injunction may subject the Defendant, or any person within the scope of this injunction, to prosecution for criminal or civil contempt of court, and to the imposition of any penalties

---

[20] This activity is also referred to as "sidewalk counseling." Sidewalk counseling has been defined by the Supreme Court as ". . . a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel . . ." *Schenck*, 519 U.S. 357 (1997).

[21] *Roach*, 947 F. Supp. at 878 (E.D. Penn. 1996).

available under the law, including but not limited to incarceration or detention, the posting of a bond, monetary penalties, payment of damages to any aggrieved persons or entities, payment of reasonable attorney's fees and costs in connection with a contempt action, and other sanctions deemed appropriate by the court.[22]

Retention of Jurisdiction

7. The Court shall retain jurisdiction to enforce the terms of this injunction for twelve (12) years from the date below.

Conclusion

For the foregoing reasons, Defendants Joseph Scheidler and Operation Rescue's motion for decertification of the two classes is DENIED. Plaintiffs National Organization for Women, Delaware Women's Health Clinic, and Summit Women's Health Clinic's motion to amend the complaint to conform to evidence is DENIED. Plaintiffs' motion for Phase II damage trials is DENIED. The court GRANTS the plaintiffs' petition for a permanent injunction to be placed upon defendants for a period of twelve (12) years. All other motions are denied as moot. This case is now closed.

---

[22] *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (referring to language of injunction quoted in 885 F. Supp. 1286, 1298 (W.D. Mo. 1995)); *Roach*, 947 F. Supp. at 878 (E.D. Penn. 1996).

APPENDIX F

The Hobbs Act, 18 U.S.C. § 1951, provides in full:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section –
>
> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
> >
> > (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
> >
> > (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, provides in relevant part:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in

connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

APPENDIX G

[*Excerpts From Jury Instructions*]

* * * *

[Tr. 4938] This lawsuit is brought under the Racketeer Influenced and Corrupt Organizations Act called RICO and state law. The plaintiffs seek injunctive relief and damages from the defendants who allegedly have conspired among themselves and with others through their alleged enterprise, the Pro-Life Action Network or PLAN, to engage in a pattern of illegal activity, which the plaintiffs contend was designed to injure the business and property of clinics where abortions are performed and to deprive women of the right to obtain the services of those clinics.

A woman's – it says women's. It should be woman's. A woman's right to obtain an abortion is not at issue in this [Tr. 4939] lawsuit. The United States Supreme Court already has declared that women have a constitutional right to choose to have an abortion, nor is the right to engage in peaceful protest an issue in this lawsuit. The parties agree that peaceful picketing, leafletting, and participating in the legislative process are activities protected by the First Amendment of the United States Constitution.

What is at issue in this case is whether the defendants engaged in activities that are prohibited by RICO. The fact that it has taken 12 years for this case to come to trial should not concern you.

In this case you have heard testimony relating to incidents of murder, arson, and bombing. There is no claim in this case, however, that the defendants themselves are responsible for any of those acts. An issue has been raised in this case as to the relationship between Operation Rescue and Operation Rescue National. On this issue you are directed that Operation Rescue and Operation Rescue National are one in the same organization for actions taken in the following times and places:

From July 31st, 1990 through December 1993 in Washington, D.C., the summer of 1991 in Wichita, Kansas; March 1st, 1989 through December 1993 in the Philadelphia, Pennsylvania metropolitan area including Cherry Hill, New Jersey. As to other times and places the issue of the [Tr. 4940] relationship between Operation Rescue and Operation Rescue National is a question for you to decide.

Also you heard testimony from Mr. Keith Tucci denying that he ever – it says never. It should be ever – that he ever observed anyone acting on behalf of Operation Rescue National or Operation Rescue engaged in activity designed to deprive a clinic of property. You are instructed that a Court of the United States has found that Operation Rescue National, Flip Benham, Keith Tucci, Don Treshman, and Rescue America engaged in activity that did deprive a clinic of property in August of 1992 during the Republican National Convention in Houston, Texas.

In this case the plaintiffs must prove every element of their RICO claims by a preponderance of the evidence. A preponderance of the evidence simply means evidence that persuades you that the plaintiffs' claim is more likely true than not true. In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses regardless of who may have called them and all exhibits received in evidence regardless of who may have produced them.

I will instruct you on the plaintiffs' burden of proof with respect to their state law claims when I give you the instructions on those claims. The plaintiffs have made two separate claims that the defendants engaged in activities [Tr. 4941] prohibited by RICO. The first, which I will refer to as Claim 1, is that the defendants committed acts which violate RICO. The second, which I will refer to as Claim 2, is that the defendants conspired to commit acts that would violate RICO. I will instruct you on the elements of each of these claims separately.

Claim 1 RICO violation. In order for you to find that the defendant violated RICO, the plaintiffs must prove by a preponderance of the evidence, 1, that PLAN is an enterprise; 2, that PLAN affected interstate commerce; 3, that the defendant was associated with PLAN; 4, that the defendants' association with PLAN involved operating or managing PLAN; and 5, that the defendant participated in the affairs of PLAN through some pattern of acts illegal under RICO.

I will now instruct you as to each of these elements. From here on in order to avoid repeating myself when I say defendant, that also means more than one defendant. If you find that more than one defendant committed a RICO violation, you may find that one, some, or all the defendants violated RICO. I will now instruct you on each of these elements.

The plaintiffs allege – first element, enterprise. The plaintiffs allege that the Pro-Life Action Network or PLAN is an enterprise with the common purpose of preventing [Tr. 4942] abortion and shutting down clinics that perform abortions. An enterprise is defined as a group of persons or organizations associated together formally or informally for a common purpose of engaging in a course of conduct.

An enterprise requires an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchial or consentual decision making. An enterprise does not have to be a legally recognized entity such as a corporation, and it need not have a formal structure with such things as officers, employees, titles, or bank accounts. Further, it does not matter whether PLAN is organized for a lawful or unlawful purpose or whether its unlawful acts actually benefitted the group.

Second element, interstate commerce. The second element requires that PLAN engaged in or had an effect on interstate commerce. In order to establish this element the plaintiffs must prove by a preponderance of the evidence that PLAN or any of its activities affected interstate commerce. For example, if the

defendants or others associated with PLAN used the United States mail or traveled or made phone calls across state lines while doing any action connected with PLAN regardless of whether these actions were unlawful, then you must find that this element has been met.

Plaintiffs must show that the defendant was associated with PLAN. That is, the defendant must have had [Tr. 4943] some minimal association with PLAN and have known something about PLAN's activities as they relate to the illegal acts under RICO. It is not necessary that the particular defendant committed acts unlawful under RICO or was aware of all of the unlawful acts committed by other people who were associated with PLAN. If the defendant was associated with PLAN at any time during its existence, this element is met. It is not necessary that the particular defendant be associated with PLAN for the entire time that it existed.

The fourth element, operating or managing an enterprise. The plaintiffs must show that as part of his or its association with PLAN the defendant participated in the operation or management of PLAN or acted at the direction of PLAN's leaders. The defendant need not have been a part of the top management or have held any formal position in PLAN.

The fifth element, pattern of unlawful activity. Plaintiffs must show that the defendant or other people associated with PLAN committed the two or more unlawful acts in any of the following categories in any 10-year period:

1, acts or threats involving extortion against a patient, prospective patient, doctor, nurse, clinic worker, or clinic. 2, threats of murder against a doctor, nurse, or clinic worker. 3, attempting or conspiring to do any of the acts listed in paragraphs 1, 2 above even if the act was not actually carried out.

[Tr. 4944] 4, acts or threats of physical violence to any person or property. 5, travel across state lines or use of the mails or telephone with the intent to promote, manage, or carry out any act of extortion, arson, or any crimes of violence in

violation of state or federal law followed by an act in furtherance of that intent. 6, attempting to travel across state lines or use the mail or telephone to do acts described in paragraph 5 above. Or 7, causing others to travel cross state lines, use the mail or telephone to do or attempt acts described in paragraph 5 above.

The two or more acts may be from the same category or different categories. I will give you further explanation about some of these categories of unlawful acts in a moment. The plaintiffs must also show that there was some connection between the acts. For example, that they happened as a result of a common scheme, plan, or motive.

Unlawful acts under RICO. I will now instruct you on the elements of certain of the unlawful acts under RICO which the plaintiffs allege that the defendants have violated.

Federal law extortion, Hobbs Act. The plaintiffs have alleged that the defendant and others associated with PLAN committed acts that violate federal law prohibiting extortion. In order to show that extortion has been committed in violation of federal law, the plaintiffs must [Tr. 4945] show that the defendant or someone else associated with PLAN knowingly, willfully, and wrongfully used actual or threatened force, violence, or fear to cause women, clinic doctors, nurses, or other staff or the clinic themselves to give up a property right.

The term property right means anything of value, including a woman's right to seek services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion, and fear. It does not matter whether or not the extortion provided an economic benefit to PLAN. Any fear involved must be reasonable under the circumstances.

Fear includes not only fear of physical violence but fear of wrongful economic injury. Exploitation of the victim's reasonable fear constitutes extortion regardless of whether or

not the defendant was responsible for creating that fear and despite the absence of any direct threats.

Plaintiffs must also show that the extortion of the defendant or others associated with PLAN affected interstate commerce. See instruction No. 19 for a definition of interstate commerce. It is sufficient if the acts of extortion were aimed at medical facilities that purchased supplies made in another state or that served patients who came from another state.

[Tr. 4946] If the defendant or someone else associated with PLAN attempted to commit such an act, it is a violation even if the act was not completed.

Definition of a threat. In order for the plaintiffs to establish a threat, they must demonstrate that the defendants or their co-conspirators made a statement or engaged in conduct in a context or under such circumstances wherein a reasonable person would foresee that the statement or conduct would be interpreted by those to whom the maker communicates the statement or conduct as a serious expression of an intention to inflict harm, including bodily harm or wrongful economic harm.

Context as used in this instruction includes the surrounding events and reaction of the listeners. Whether an action or statement is a threat is a matter for you the jury to decide. For example, you have heard evidence about physical blockades at clinics. You must decide whether the act of blockading constituted a threat. You need not find that the defendant or co-conspirator intended to carry out the threat or was even capable of carrying out the threat in order to find that the action or statement was, in fact, a threat.

State law extortion. Plaintiffs have alleged that the defendants and others associated with PLAN committed acts that violate various states' laws against extortion. In [Tr. 4947] order to show that state law extortion has been committed, the plaintiffs must show that the defendant or someone else associated with PLAN intentionally caused women, clinic

doctors, nurses, or other staff or the clinics to give up a property right.

The term property right means anything of value, including a woman's right to seek medical services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services from wrongful threats, violence, coercion, and fear.

Plaintiffs must also show that the defendant or other persons associated with PLAN did this through the use of violence or fear including threats of personal injury, damage to property, or economic interests, or threats to commit other crimes. The threat need not have been actually carried out and the defendant need not have even actually intended to carry out the threat.

If you find that the defendant or another person associated with PLAN committed, attempted, or conspired to commit extortion in certain states, you must also find that the value of the rights involved is as follows:

In Missouri more than $150, in Kansas more than $500, and in Texas more than $1500.

State law attempted extortion. A defendant or [Tr. 4948] another person associated with PLAN committed the unlawful act of attempted extortion under state law if you find that 1, he or she intended to commit extortion; 2, he or she took a substantial step towards committing extortion; and 3, the attempt was accompanied by a threat.

Proximate cause. Finally you must consider whether there was some direct relationship between the wrongful action of the defendant or others associated with PLAN and the injury or harm to plaintiffs' business or property rights, which includes a woman's right to seek medical services from a clinic, the right of doctors, nurses, and other clinic staff to perform their jobs, and the right of the clinics to provide medical services.

An injury or harm is proximately caused when an act plays a substantial part in bringing about or actually causing the injury

or harm. In determining whether actions of defendant or someone else associated with PLAN proximately caused the injury or harm to the plaintiffs, you may consider the various unlawful acts under RICO discussed above and any overt act taken in furtherance of PLAN's goals.

Threat of murder. Although plaintiffs do not allege that the defendants committed murder, they do allege that the defendants and others associated with PLAN have threatened murder against doctors and clinic staff members. Murder is the killing of a human being if it was done 1, intentionally [Tr. 4949] and with premeditation; or 2, unintentionally but recklessly under circumstances showing extreme indifference to the value of human life.

The defendants' liability for acts of others. Liability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence. In order to find the defendants liable, you must conclude that the enterprise or those acting on behalf of the enterprise directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives.

Claim 2, RICO conspiracy. Plaintiffs have also alleged that each defendant engaged in a conspiracy to violate RICO. This means that a defendant agreed with one or more other persons that defendants or others associated with PLAN would engage in acts that violate RICO. A person may be liable for conspiring to violate RICO even if you find that the conspiracy was not successful and no unlawful acts were actually committed.

If you have found all the defendants liable under Claim 1, then you need not consider this second claim. However, if you have found any defendant not liable under Claim 1, then you should consider whether that defendant agreed with any other person or organization to violate RICO.

[Tr. 4950] Agreement. To prove liability for conspiring to violate RICO, the plaintiffs must prove that the defendant

knowingly became associated with PLAN and agreed with another person to operate and manage PLAN through a pattern of racketeering activity. You do not need to find that the defendant agreed to personally commit unlawful acts under RICO. People or groups who are associated with the RICO enterprise may agree to divide up the work, and each person who agrees to operate or manage an enterprise through a pattern of unlawful acts under RICO may be liable even if he intended that someone associated with the enterprise would carry out the unlawful acts.

Once a defendant agrees with a co-conspirator that PLAN would engage in RICO violations, that defendants is responsible for the previous acts of the conspiracy as well.

Multiple conspiracies. You must determine whether a single conspiracy existed between two or more conspirators. If you find that no such conspiracy existed, then you must return a verdict in favor of the defendants on this count. Proof of several separate conspiracies does not prove that a single overall conspiracy existed. While the parties to the agreement must know of each other's existence, they need not know each others' identity nor need there be direct contact.

The agreement may continue for a long period of time and include the performance of many transactions. New [Tr. 4951] parties may join the agreement at any time, while others may terminate their relationship. The parties are not always identical, but this does not mean that there are separate conspiracies. The distinction must be made between separate conspiracies, where certain parties are common to all and one overall continuing conspiracy with various parties joining and terminating their relationship at different times.

Various people knowingly joining together in furtherance of a common design or purpose constitute a single conspiracy. While the conspiracy may have a small group of core conspirators, other parties who knowingly participate with those co-conspirators and others to achieve a common goal may be

members of an overall conspiracy. In essence, the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the parties constitutes a single conspiracy.

If you decide that such a conspiracy did exist, you must determine whether the defendants were members of that conspiracy. If you should find that a particular defendant was a member of some other conspiracy but not the one alleged, then you must return a verdict in favor of that defendant.

The First Amendment. The First Amendment to the [Tr. 4952] Constitution permits persons to join with others to express a particular viewpoint. In public debate, speech including conduct is protected by the First Amendment. This may be so even if the speech is uninvited and unwelcome by the person to whom it is directed or to others within earshot. The First Amendment even protects speech that is insulting or even outrageous.

You have heard evidence of speeches made by some of the defendants and have read some of their writings. Some of those speeches and writings contain strong and emotional language. Mere advocacy of the use of force and violence may not be the basis for finding defendants liable for having made the speech or authored the writing unless the words used may be used to incite imminent unlawful conduct that, in fact, followed within a reasonable period.

Speeches and writings may be taken, however, as evidence that the defendants or the enterprise gave other specific instructions to carry out violent acts or threats.

Threats to patients, owners or operators of clinics, clinic staff including doctors and those assisting patients, owners, operators, or clinics or staff are not protected by the First Amendment. Physical attacks on patients, owners, operators of clinics, or clinic staff are not protected by the First Amendment.

Destruction of property is not protected by the First Amendment. The protection of the [Tr. 4953] First Amendment does not extend to joining together to deprive others of their lawful rights.

Damages. In considering the issue of damages, if any, with respect to the RICO claim you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just, and reasonable compensation for all of the damages to the plaintiff and its business or property, no more and no less. Damages may not be based on speculation because it is only actual damages, what the law calls compensatory damages that you are to determine.

You should consider the amount of damages, if any, with respect to each claim separate and independent from the amount of damages, if any, with respect to other claims. For example, and by way of example only, if you determine that damages should be awarded to a plaintiff under his RICO claim, you should award full, just, and reasonable compensation for damages under the RICO claim without regard to the damages, if any, you might award under any other claim.

Damages for personal injury such as pain and suffering, emotional suffering, humiliation, and mental anguish are not recoverable under RICO. You should not award damages for any personal injuries or harm derived from personal injuries.

[Tr. 4954] During the trial of this case ceratin testimony has been presented to you by way of deposition consisting of sworn recorded answers to questions asked of a witness in advance of trial by one or more of the attorneys for the parties to the case. The testimony of the witness who for some reason cannot be present to testify from the witness stand may be presented in writing under oath. Such testimony is entitled to the same consideration and is to be judged as to credibility, weighed, and otherwise considered by the jury insofar as possible in the same way as if the witness had been present and had testified from the witness stand. All persons are equal before the law.

This case should be considered and decided by you as an action between persons of equal standing in the community of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations stand equal before the law and are to be dealt with as equals in a court of justice.

Although there are more than one plaintiff in this action, it does not follow from that fact alone that if one is entitled to recover all are entitled to recover. The defendants are entitled to a fair consideration of their defense as to each plaintiff, just as each plaintiff is [Tr. 4955] entitled to a fair consideration of its claim against each defendant. Unless otherwise stated, all instructions given you govern the case as to each plaintiff.

Multiple defendants. Although there are five defendants in this action, it does not follow from that fact alone that if one is liable all five are liable. Each defendant is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you find against any of the others. Unless otherwise stated, all instructions given to you govern the case as to each defendant.

* * * *

[Tr. 4957] Now, ladies and gentlemen, accompanying the verdict form are what we call special interrogatories. They are questions directed to you as a jury. They must be answered by you as a group. You are to answer these questions and return them with the verdict form.

* * * *

APPENDIX H

[*Special Interrogatories and Verdict Form*]

We, the jury in this action, unanimously find as follows:

1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?

   Yes ✓ No ___

2. Were the following Defendants associated with PLAN? (see Jury Instruction No. 20 for the definition of "associated with")

Joseph Scheidler	Yes ✓	No ___
Andrew Scholberg	Yes ✓	No ___
Timothy Murphy	Yes ✓	No ___
Pro-Life Action League	Yes ✓	No ___
Operation Rescue	Yes ✓	No ___

3. Did the following Defendants participate in the operation management of PLAN? (see Jury Instruction No. 21 for a definition of participation in operation or management)

Joseph Scheidler	Yes ✓	No ___
Andrew Scholberg	Yes ✓	No ___
Timothy Murphy	Yes ✓	No ___
Pro-Life Action League	Yes ✓	No ___
Operation Rescue	Yes ✓	No ___

4. Did any Defendant, or any other person associated with PLAN, commit any of the following acts?:

		Yes	Number of Acts	No
(a)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of federal law	✓	21	
(b)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of the law of any state	✓	25	
(c)	Threats of murder against a doctor, nurse, or clinic employee		0	✓
(d)	Attempt or conspiracy to do any of the acts listed above, even if the act was not actually carried out	✓	25	
(e)	Acts or threats of physical violence to any person or property	✓	4	
(f)	Travel across state lines, or the use of the mail or telephone, with intent to commit or facilitate an unlawful act, such as extortion, under state or federal law	✓	23	

(g)	Attempt to do an act described in (f) above, even if the act was not actually carried out	✓	23	
(h)	Causing another person to do an act described in (f) above		0	✓

5. Were at least two (2) of these acts committed during any ten-year period?

Yes ✓ No ____

6. If you answered "yes" to any item of 4(a) or 4(b), was your answer based solely blockades of clinic doors or sit-ins within clinics, without more?

Yes ____ No ✓

7. Did PLAN or persons associated with PLAN engage in a "pattern" of at least two of the acts that you found in Question 4 above? (see Jury Instruction No. 28 for the definition of "associated with")

Yes ✓ No ____

8. Did any of the acts that you found in Question 4 above affect interstate commerce? (see Jury Instruction No. 19 for the definition of interstate commerce)

Yes ✓ No ____

9. If any defendant or person associated with PLAN committed any two (2) acts described or listed above in question number 4 within any 10 year period, did those acts proximately cause injury to the business or property of the

following plaintiffs? (see Jury Instruction No. 28 for the definition of proximate cause)

The women represented by NOW:

Yes ✓ No ____

Delaware Women's Health Organization:

Yes ✓ No ____

Summit Women's Health Organization:

Yes ✓ No ____

If you answered "yes" to Questions 1, 5, 7 and 8, and if you found that at least two acts were committed in Question 4, and if you answered "yes" as to any Defendant(s) in Questions 2 and 3, you have found those Defendant(s) liable on Claim I, and you should proceed to the next question:

10. As to the Defendants whom you have found liable on Claim I, what amount will adequately compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization $ 54,471.28

Delaware Women's Health Organization $ 31,455.64

If you found all of the Defendants liable on Claim I, you need not proceed any further; simply go to the last page and sign and date the Verdict Form.

If you did not find all of the Defendants liable on Claim I, you should answer the following questions as to Claim II for any such Defendant(s):

11. Did the following Defendants combine or agree with one another or with others to operate PLAN through a pattern of acts illegal under RICO?

Joseph Scheidler	Yes ____	No ____
Andrew Scholberg	Yes ____	No ____
Timothy Murphy	Yes ____	No ____
Pro-Life Action League	Yes ____	No ____
Operation Rescue	Yes ____	No ____

12. As to the Defendant or Defendants whom you have found liable on Claim II, what amount will adequately compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization $ _____

Delaware Women's Health Organization $ _____

Please now sign and date the verdict form and tell the bailiff that you have reached a verdict.

_____	_____
Date	Foreperson
_____	_____
Juror	Juror
_____	_____
Juror	Juror

Juror	Juror

Supreme Court, U.S.
FILED
MAY 10 2005
OFFICE OF THE CLERK

(3) (2)

Nos. 04-1244 & 04-1352

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*,

Petitioners,

-and-

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

LOWELL E. SACHNOFF
CASEY WESTOVER
SACHNOFF & WEAVER, LTD.
10 South Wacker Drive
Suite 4000
Chicago, IL 60606
312-207-1000

FAY CLAYTON
Counsel of Record
SUSAN VALENTINE
ADAM HIRSCH
ROBINSON CURLEY
& CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, IL 60606
(312) 663-3100

Attorneys for Respondents

PARTIES

There are two sets of Petitioners. Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and the Pro-Life Action League, Inc., are referred to herein collectively as "Scheidler" or the "Scheidler Petitioners." Operation Rescue is referred to herein as "OR." The Scheidler petition is cited as "Sch. Pet.," and its appendix as "Sch. App." OR's petition is cited as "OR Pet.," and its appendix as "OR App." The Appendix to this Brief in Opposition is cited as "App."

RULE 29.6 STATEMENT

Respondents are the National Organization for Women, Inc.; National Women's Health Organization of Summit, Inc., d/b/a Summit National Women's Health Organization; and National Women's Health Organization of Delaware, Inc., d/b/a Delaware Women's Health Organization. Respondents were plaintiffs below and were also respondents before this Court in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*"). None of the Respondents has a parent corporation and none issues stock to the public.

TABLE OF CONTENTS

Page

PARTIES i

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iv

DECISIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

A. Factual Background: The Jury and the Trial Court Found 121 Predicate Acts Under RICO, Including 4 Acts or Threats of Physical Violence 3

B. After the Trial, Petitioners Asked the Seventh Circuit to Reverse all the Predicate Acts, Including the 4 Acts or Threats of Physical Violence 6

C. Petitioners Did Not Seek a Writ of *Certiorari* Regarding the 4 Acts or Threats of Physical Violence 6

D. *Scheidler II* Did Not Address the Physical Violence Issue 8

E. The Seventh Circuit Identified the Remaining Issues and Remanded to the District Court 10

ARGUMENT 13

A. The Seventh Circuit's Remand Order Is Entirely Consistent with *Scheidler II*. 14

1. This Court Did Not Rule on the Physical Violence Issue 14

2. *Scheidler II* Did Not Preclude Further Proceedings on Undecided Issues 17

3. Petitioners' New Mandate Rule Would Create Needless Litigation in This Court 19

4. Petitioners' Waiver Argument is Baseless ... 22

B. The Seventh Circuit Opinion is a Not a Final Judgment, and this Case is Not a Proper Vehicle for Deciding the Remaining Questions Presented 24

1. This Court Disfavors Taking *Certiorari* Over Cases Remanded by the Court of Appeals Prior to Final Judgment 25

2. No Court has Yet Addressed the Physical Violence Issue in this Case 27

3. This Case Might Be Resolved in Petitioners' Favor on Other Grounds Below 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: **Page(s)**

Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001).....28

Austin v. United States, 509 U.S. 602 (1993).....28

Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327 (1967).....25, 26

Cheney v. United States District Court, __ U.S. __, 124 S.Ct. 2576 (2004).....26

Costello v. United States, 365 U.S. 265 (1961).....7

Glover v. United States, 531 U.S. 198 (2001).....14, 15, 17

Hamilton- Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916).....25

In re Sanford Fork & Tool Co., 160 U.S. 247 (1895).....17, 18, 19

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993).....24

Lopez v. Davis, 531 U.S. 230 (2001).....14

Matsushita Electric Industrial Co., Ltd. v. Epstein, 516 U.S. 367 (1996).....23

Quern v. Jordan, 440 U.S. 332 (1979).....19

Roberts v. Galen of Virginia, Inc., 525 U.S. 249 (1999).....20

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939).....18, 19

Toyota Motor Manufacturing Ky., Inc. v. Williams, 534 U.S. 184 (2002).....14

United States. v. Kellington, 217 F.3d 1084 (9th Cir. 2000).....19

United States v. Yankowski, 184 F.3d 1071 (9th Cir. 1999).....27

Vendo Co. v. Lektro-Vend Corp, 434 U.S. 425 (1978).....26

Virginia Military Institute v. United States, 508 U.S. 946 (1993).....25, 26

West v. Gibson, 527 U.S. 212 (1999).....14, 20, 23

Yee v. City of Escondido, 503 U.S. 519 (1992).....15, 20, 21, 23

* * * * * * * * *

Constitutional and Statutory Provisions:

28 U.S.C. § 1254(a).....1

28 U.S.C. § 1651.....1, 27

18 U.S.C. § 1951.....4, 23

18 U.S.C. § 1951(a).....*passim*

18 U.S.C. § 1952.....4

18 U.S.C. § 1961(5).....29

18 U.S.C. § 1962(c).....3, 29

18 U.S.C. § 1964.....23

Seventh Circuit Rule 54.....10

Supreme Court Rule 14.1.....16

Supreme Court Rule 14.1(a).....14, 15, 22

Supreme Court Rule 20.1 27
Supreme Court Rule 20.2 26
Supreme Court Rule 20.3 26
Supreme Court Rule 20.3(a) 27

* * * * * * * * * *

Other Authorities:

Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 4001 (2d ed. 1996). 21

Robert L. Stern, et al., SUPREME COURT PRACTICE (8th ed. 2002) 7

BRIEF IN OPPOSITION

DECISIONS BELOW

The Seventh Circuit's decision denying rehearing (Sch. App. 1a-24a) is reported at 396 F.3d 807. That court's decision on remand, (Sch. App. 25a-29a), is unreported. Remand was from this Court's decision, (OR App. 32a-55a), reported at 537 U.S. 393 ("*Scheidler II*"). *Scheidler II* reversed and remanded the Seventh Circuit's decision, (Sch. App. 30a-61a), reported at 267 F.3d 687. The grants of *certiorari* precedent to *Scheidler II*, (OR App. 138a), are reported at 535 U.S. 1016. This case was before this Court previously, and the decision is reported at 510 U.S. 249 ("*Scheidler I*"). The trial court's entry of judgment against Petitioners and issuance of an injunction, (Sch. App. 141a-195a), was not reported.

JURISDICTION

All Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(a) as to all questions presented. The Scheidler Petitioners also invoke jurisdiction under 28 U.S.C. § 1651 as to their first question. Petitioners have complied with the Court's requirements for *certiorari* jurisdiction under § 1254(a) but have not met the requirements of § 1651. *See* n.7, *supra*.

STATEMENT OF THE CASE

At the heart of Petitioners' request for a writ of *certiorari* are two purported holdings – one by this Court and one by the Seventh Circuit – that simply do not exist. Petitioners

first contend that in *Scheidler II*, this Court held in favor of the "two-way" rather than the "three-way" reading of the Hobbs Act, 18 U.S.C. § 1951(a), and reversed the jury's finding of 4 acts or threats of physical violence.[1] Petitioners never asked the Court to make that ruling in *Scheidler II*, however. Second, Petitioners argue that, on remand from *Scheidler II*, the Seventh Circuit held against them as to whether the Hobbs Act forbids acts or threats of physical violence that obstruct, delay, or affect interstate commerce and upheld the injunction entered against them after trial. In fact, the Seventh Circuit did neither. It twice stated that it had *not* decided the physical violence issue and had remanded to the trial court, *first*, to determine whether the 4 acts involving physical violence *could* support an injunction, and, *second*, to address the physical violence issue – but *if and only if* the trial court first determined that an injunction was otherwise called for. Sch. App. 6a–8a, 28a–29a.

None of the questions presented by Petitioners warrants *certiorari*. Each Petitioner's first question asks whether the Seventh Circuit disregarded *Scheidler II* by remanding to the district court to address the physical violence predicates found by the jury. In *Scheidler II*, Petitioners did not ask this Court to review the jury's findings regarding these 4 acts, but they now contend that this Court reached beyond both their petitions and the Court's own limited grant of *certiorari* and

[1] Respondents' interpretation of § 1951(a) is referred to as the "three-way" interpretation, as it forbids robbery, extortion and physical violence. Petitioners' is referred to as the "two-way" interpretation, as it forbids only robbery and extortion.

decided the physical violence issue in Petitioners' favor – without saying even one word on the subject. The Court should follow its long-standing practice of allowing lower courts on remand to determine whether issues remain open and to resolve any such issues in the first instance.

Petitioners' second and third questions involve statutory construction questions that are not yet ripe for consideration and that may be rendered moot by the district court's action on remand. In fact, the second question, whether § 1951(a) should be given the two-way or three-way reading, has never been decided by any court in this litigation. Before considering *certiorari*, the Court should wait to see whether these questions are mooted by further proceedings below.

A. Factual Background: The Jury and the Trial Court Found 121 Predicate Acts Under RICO, Including 4 Acts or Threats of Physical Violence

Respondents filed this case to protect themselves – medical providers and patients – from Petitioners' attempts to disrupt healthcare facilities that offer a wide range of women's health services, including abortions, by *inter alia*, forcible blockades and violence. The district court initially dismissed the complaint, and the Seventh Circuit affirmed. This Court, however, reversed, finding that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), does not have an "economic motive" requirement. *Scheidler I*.

On remand, the district court conducted a seven-week jury trial. Respondents offered proof that Petitioners were

responsible for dozens of predicate acts under RICO, including state law extortion; extortion under the Travel Act, 18 U.S.C. § 1952; and two distinct types of Hobbs Act violations: (1) extortion, and (2) acts or threats of physical violence. 18 U.S.C. § 1951. The distinction between these types of Hobbs Act violations is at the heart of the current dispute. The Hobbs Act is titled "Interference with Commerce by Threats or Violence" and states:

> Whoever in any way or degree obstructs, delays or affects commerce ... by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). The special interrogatories to the jury posed separate questions on the extortion and physical violence prongs of §1951(a), and the physical violence predicates did not require a connection to robbery or extortion. Petitioners now argue that this was error because, they say, their physically violent acts violate § 1951(a) only if they were in furtherance of a plan to commit robbery or extortion.

Respondents presented evidence of several acts involving physical violence that had been authorized or ratified by Petitioners' enterprise, the Pro-Life Action Network ("PLAN"), with specific intent by each Petitioner. Sch. App. 185a. For example:

- A patient seeking follow-up treatment to ovarian surgery was grabbed and beaten with an anti-abortion sign until her sutures ruptured and she passed out. Trial Transcript ("Tr.") 1514–26, 4985.
- A healthcare facility was invaded, its medical equipment was "trashed," and a staff member and a volunteer were attacked and seriously injured. Tr. 1468-72, 4012-26, 4975.
- Patients trying to pass through a corridor created by federal marshals were grabbed, scratched and bruised. Tr. 766-85, 4984.
- A doctor was grabbed by the leg and shoved against a van to prevent her from entering the clinic. Tr. 1705-06, 4986.
- A clinic administrator was grabbed by the hair and thrown to the concrete sidewalk as she tried to enter the clinic. Tr. 4826-30.

A unanimous jury returned a verdict with detailed special interrogatories, finding Petitioners responsible for operating PLAN through a pattern of 121 RICO predicates, including 4 acts or threats of physical violence. Sch. App. 190a–195a. 117 of these predicate acts were premised on federal or state extortion, including 21 Hobbs Act extortion violations, 25 state law extortion violations, 25 instances of attempting or conspiring to violate state or federal extortion law, 23 Travel Act extortion violations, and 23 attempted Travel Act extortion violations. The 4 acts or threats of physical violence under § 1951(a) were not premised on extortion. Sch. App. 191a; *see also* Sch. App. 190a–195a.

The trial court entered judgment on the jury's verdict and issued an opinion citing several of the physically violent acts proved at the trial. Sch. App. 142a-145a. Based on its findings, the trial court issued a nationwide injunction prohibiting Petitioners from, among other things, "using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic." Sch. App. 172a.

B. After the Trial, Petitioners Asked the Seventh Circuit to Reverse all the Predicate Acts, Including the 4 Acts or Threats of Physical Violence

Petitioners appealed to the Seventh Circuit, arguing that all the predicate acts should be declared invalid bases for RICO liability. The Seventh Circuit acknowledged the jury's finding of 4 acts involving physical violence among the 121 predicate acts, Sch. App. 34a, but concluded that the 21 extortion-based Hobbs Act violations were sufficient to affirm the judgment. Therefore, it did not reach Petitioners' argument for the two-way reading of § 1951(a). Sch. App. 59a-60a. Thus, at the conclusion of the Seventh Circuit appeal, in what would soon become *Scheidler II*, Respondents remained the prevailing party on the 4 physical violence predicates.

C. Petitioners Did Not Seek a Writ of *Certiorari* Regarding the 4 Acts or Threats of Physical Violence

In their petitions for writs of *certiorari* following their loss in the Seventh Circuit, Petitioners asked this Court to

decide various questions, but no Petitioner challenged the 4 physical violence predicates found by the jury as a basis for RICO liability. Rather, the Scheidler Petitioners asked the Court to review the availability of injunctions to private RICO litigants, whether the First Amendment shielded their conduct, and whether the Hobbs Act's extortion prong applied to "protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there." 01-1118 Cert. Pet. i. OR asked the Court to review the injunction question, a First Amendment question, whether they had obtained property under the "federal extortion statute," and whether "generic" state extortion instructions were proper. 01-0119 Cert. Pet. i.

Respondents' Brief in Opposition noted that the 4 predicate acts premised on physical violence were unchallenged by Petitioners. 01-0119, 01-0118 Br. In Opp'n 5 n.4, 7, 15. In reply, each of the Petitioners devoted only a footnote to the physical violence issue, arguing the two-way approach. 01-0118 Cert. Reply Br., 8 n.11; 01-0119 Cert. Reply Br., 7 n.13. Petitioners did not, however, revise their petitions or otherwise ask this Court to review this additional question of statutory construction, as they were permitted to do. *Costello v. United States*, 365 U.S. 265, 284 (1961); Robert L. Stern et al., SUPREME COURT PRACTICE, p. 427 (8th Ed. 2002).

This Court limited its grant of *certiorari* to two of the questions presented: the availability of injunctions in private

RICO cases, and whether Petitioners' "sit-ins and demonstrations" were extortion under the Hobbs Act. OR App. 138a.

Petitioners' merits briefs failed to discuss the physical violence issue. Although they listed the 4 acts involving violence in their descriptions of the proceedings, they did not argue for their two-way interpretation of § 1951(a). 01-0118 Merits Br. 7, n.7; 01-0119 Merits Br. 4, n.8, 5, n.10. Indeed, Petitioners' only mention of these 4 acts was their observation that without the 21 Hobbs Act extortion violations, there was no way to determine whether the remaining predicate acts satisfied RICO's "pattern" requirement. Therefore, they argued, the judgment should be vacated, presumably for further proceedings in the trial court. 01-0119 Merits Br. 17 n.12. (This argument foreshadowed the Seventh Circuit's action on remand: a further remand to the trial court to determine whether the 4 physical violence predicates alone could support injunctive relief.) Petitioners also failed to raise their two-way interpretation of § 1951(a) at oral argument. Quite logically, the Court made no inquiry on the subject and Respondents made no response.

D. *Scheidler II* Did Not Address the Physical Violence Issue

Because Petitioners did not raise the issue in their questions presented or in their merits briefs, the proper interpretation of the physical violence prong of §1951(a) was not before this Court in *Scheidler II*. It was not surprising, then, that this Court did not say one word on the subject. In

fact, the 4 physical violence predicates found by the jury were excluded from the Court's description of the jury's findings, which enumerated only the 117 extortion-based predicates rather than the full 121.[2] OR App. 34a. The Court's discussion, too, never mentioned this issue, but focused on whether Petitioners had "obtained property" within the meaning of extortion. The Court concluded Petitioners had not "obtained property," and thus invalidated the 21 Hobbs Act extortion predicates. *Id.* at 37a-46a.

The Court also concluded that its holding that extortion required the acquisition of property controlled the other extortion-based predicates.[3] Because none satisfied the "obtaining property" requirement, the Court also invalidated the state law and Travel Act extortion predicates:

> Because petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed. The 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But

---

[2] In listing the extortion-based predicate acts, the Court noted that the jury had found, "*inter alia*," that the pattern of racketeering included acts of Hobbs Act extortion, state law extortion, Travel Act extortion, plus attempts or conspiracies under each of those laws.

[3] As OR notes, OR Pet. at 4 n.3, the state and federal extortion instructions were virtually identical except for the interstate commerce element.

> we have already determined that petitioners did not commit or attempt to commit extortion.

Id. at 47a-48a.

Entirely absent from the Court's discussion is any mention of the 4 predicate acts found by the jury premised on physical violence. Not one word. Having invalidated all of the extortion-based predicates, however, the Court added that because "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." *Id.* at 48a. The Court did not vacate the judgment, but ordered: "the cases are remanded to the United States Court of Appeals for the Seventh Circuit *for further proceedings in conformity with the opinion of this Court*." App., *infra*, 1 (emphasis added). The issue of what "further proceedings" were appropriate thus remained for the Seventh Circuit to determine.

E. The Seventh Circuit Identified the Remaining Issues and Remanded to the District Court

On remand to the Seventh Circuit, the parties complied with Seventh Circuit Rule 54, which requires "statements of [the parties'] positions as to the action which ought to be taken by [the] court on remand." Petitioners asked that the injunction be vacated and the case remanded to the trial court with instructions to enter judgment in their favor. App., *infra*, 5a, 10a. Respondents, however, noted that *Scheidler II*

had "disposed of only the 117 extortion-based predicate acts," and that Petitioners had failed to "seek a *writ of certiorari* on the non-extortion-based predicate acts found by the jury," namely the 4 acts or threats of physical violence. App., *infra*, 13a. Because that issue had been neither presented to nor decided by this Court, Respondents suggested that a remand to the trial court to address the issue was appropriate. App., *infra*, 14a-15a. OR filed a response, App., *infra*, 17a-22a, and Respondents a short reply. App., *infra*, 23a-27a.

After considering the parties' various Rule 54 submissions, the Seventh Circuit concluded:

> Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of *certiorari*, we will not presume that in this case it went beyond the scope of its grant of *certiorari*, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction.

Sch. App. 28a. Therefore, the Seventh Circuit remanded the case to the district court to determine whether the physical violence predicates were alone sufficient to support an injunction. *Id. at* 28a-29a. The court stressed that as part of that inquiry – *if but only if* the trial court found injunctive relief were warranted – the trial court might need to address the statutory interpretation question Petitioners now urge on

this Court – whether physical violence is an independent violation of the Hobbs Act, or whether it must relate to robbery or extortion. *Id.*

Petitioners responded by filing petitions for rehearing and rehearing *en banc* in the Seventh Circuit, urging: (1) that this Court had resolved the physical violence issue in their favor by eliminating 117 of the 121 predicate acts found by the jury, and (2) that § 1951(a) could not be interpreted to prohibit physical violence unrelated to robbery or extortion. The Seventh Circuit denied rehearing *en banc*, and with only two dissents issued a new opinion further explaining its ruling.[4] Sch. App. 1a-24a. That rehearing opinion again observed that *Scheidler II* had not addressed the 4 acts involving physical violence: "Indeed, any reader will see that the Court had nothing at all to say about them, for the understandable reason that they were not included in the petitions for *certiorari*." Sch. App. 7a. The court emphasized that the unaddressed Hobbs Act question was a difficult and important one, and "for reasons of judicial economy and restraint," ruled it should be decided by the district court in the first instance. The Seventh Circuit also directed the district court to address that issue only if it first determined that an injunction was otherwise supportable. *Id.*

> If and only if the district court concludes that some form of injunctive relief would be justified based on

[4] Judge Flaum joined the two dissenters in supporting rehearing *en banc* but did not join the dissent from the opinion on rehearing. Sch. App. 1a n. *

> the four remaining predicate acts found by the jury, that court will have to confront the more complex legal issue, whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate under RICO.

Id. at 7a-8a. The court stressed: "[T]here is no need for this court to decide a question that may not even be pertinent to the case once the district court has looked at the points on remand." *Id.* at 7a.

Petitioners, dissatisfied with an interim remand to the district court, asked this Court to take up this case for a third time.

ARGUMENT

Petitioners now seek a writ of *certiorari* on three questions. First, they say the Seventh Circuit disobeyed this Court's holding in *Scheidler II* by remanding to the district court to consider the physical violence issue that was neither presented to nor considered by this Court in *Scheidler II*. But as this Court has often held, on remand courts are bound only by issues within the compass of this Court's decision; they are free to identify and decide any other issues that remain undecided. The Seventh Circuit's decision to remand the remaining issues faithfully follows a century of precedent. *Certiorari* is wholly inappropriate.

Petitioners also ask this Court to grant *certiorari* on two substantive issues: first, whether the two-way or three-way reading of the Hobbs Act is correct; and, second, whether an injunction is available, a question that this Court declined to

decide in *Scheidler II*. At its current stage, however, this case is not a proper vehicle for either question. The Seventh Circuit remanded the case to the district court, where several factual determinations must first be made. A decision in Petitioners' favor on any one of these fact questions could moot both questions that Petitioners now present. This Court should abide by its settled practice of denying *certiorari* over non-final rulings remanding matters to the district court.

A. The Seventh Circuit's Remand Order Is Entirely Consistent with *Scheidler II*.

1. This Court Did Not Rule on the Physical Violence Issue. This Court's Rule 14.1(a) provides that: "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). Although the rule is not a jurisdictional bar, this Court routinely refuses to address issues not fairly included in the questions presented. *See, e.g., Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 202–03 (2002); *Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001); *West v. Gibson*, 527 U.S. 212, 223 (1999) ("These matters fall outside the scope of the questions presented in the [ ] petition for certiorari. We remand the case so that the Court of Appeals can determine whether these questions have been properly raised and, if so, decide them."). Instead, any issues outside the grant of *certiorari* are typically left to the lower courts on remand. *See Glover v. United States*, 531 U.S. 198, 205 (2001).

In *Glover*, the government raised "various arguments for alternative grounds to affirm the Court of Appeals." *Id.*

Even though the parties had "joined issue" on these additional questions in their merits briefs (something that the parties did not do on the physical violence issue in *Scheidler II*), the Court refused to consider them, explaining:

> As a general rule … we do not decide issues outside the question presented by the petition for certiorari. This Court's Rule 14.1(a). Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance.

Id. As in *Glover*, Petitioners chose not to ask this Court to consider every issue when they petitioned for *certiorari* in *Scheidler II*. Instead, the predicate-acts-related questions that they posed focused exclusively on the meaning of "extortion." If Petitioners had wanted this Court to address the physical violence issue, it was their obligation to raise it in their "questions presented." *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992), ("it is the petitioner himself who controls the scope of the questions presented.")

As the Seventh Circuit observed in *Scheidler II*, this Court itemized and overruled 117 of the 121 predicate acts found by the jury but said nothing about the 4 remaining physical violence predicates. Sch. App. 6a-7a. Because the physical violence issue was not included in the questions presented for *certiorari*, was not addressed in the merits briefs to the Court, was not raised at oral argument, and was not mentioned in the Court's decision, on remand, the

Seventh Circuit understandably concluded that the issue had not been decided by this Court: [5]

> Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari, we will not presume that in this case it went beyond the scope of its grant of certiorari, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction.

Sch. App. 28a.

Petitioners make the curious argument that because this Court invalidated the extortion-based predicates under state law and the Travel Act, this illustrates the Court's disregard for Rule 14.1(a). From this dubious springboard, they then argue that the Court somehow implicitly adopted their two-way reading of the Hobbs Act. Such reasoning defies logic. Although the Court decided that the meaning of extortion under the Hobbs Act controlled the meaning of that same word under state law and the Travel Act – an issue that the parties briefed on the merits – the Court *did so expressly*, with a detailed explanation of its reasoning. OR App. 46a-47a. The Court's discussion showed why these issues were

[5] The Seventh Circuit did not suggest that this Court "overlooked" or "failed" to address the physical violence issue, as OR says at 6. In the Seventh Circuit's view, it was inevitable that this Court would not address the issue given that Petitioners never raised it.

fairly included in the extortion question on which the Court had granted *certiorari*. The Court's explicit ruling on these additional extortion-based predicates does not suggest that the Court also made *implicit* rulings on the separate physical violence issue, which was not even mentioned in the Court's opinion.

As this Court has repeatedly declared, issues not raised in the petitions for *certiorari* and not addressed by the Court are left to the consideration of the lower courts on remand. *Glover*, 531 U.S. at 205. The Seventh Circuit's remand to the district court to consider the physical violence issue was entirely consistent with the *Scheidler II* holdings.

2. *Scheidler II* Did Not Preclude Further Proceedings on Undecided Issues. Petitioners' argument hinges exclusively on the final paragraph of *Scheidler II*. They say that because it says "all of the predicate acts ... must be reversed," the lower courts could not address the undecided physical violence issue on remand. Petitioners' approach would contradict over a century of precedent and result in a dramatic expansion of litigation before this Court.

Petitioners cite only one case for their argument that the final paragraph of *Scheidler II* foreclosed consideration of undecided issues on remand, *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895). *Sanford Fork*, however, undermines Petitioners' position rather than supports it.

In *Sanford Fork*, the petitioners argued that the circuit court disobeyed this Court's mandate by allowing amendments to the pleadings after the Court had reversed a

judgment for plaintiff. *Id.* at 258–59. The Court disagreed, explaining that it had not issued a final judgment, and – in language like that used here – made clear that it had only "ordered the judgment for the plaintiff to be reversed and the cause remanded to the circuit court for further proceedings not inconsistent with the opinion of this court." *Id.* at 258; App., *infra*, 1a. Thus, the Court explained that the circuit court was free, in its discretion, to allow amendments of the pleadings on remand. *Sanford Fork*, 160 U.S. at 259. Although the Court reaffirmed that lower courts must obey its mandate, the Court emphasized that the circuit court was nonetheless free to determine and resolve any remaining issues: "the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only." *Id.* at 255.

The key to the circuit court's proper role on remand lies in determining what this Court has actually decided. As the Court explained in *Sanford Fork*, "When a case has been once decided by this court on appeal, and remanded to the circuit court, *whatever was before this court, and disposed of by its decree, is considered as finally settled.*" *Id.* (emphasis added). On remand, therefore, the circuit courts must determine whether any issues remain and, if so, how to resolve them.

Other opinions of this Court emphasize this long-standing rule. *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 168 (1939) (while a mandate is controlling as to matters within its compass, on remand, a lower court is free as to other issues);

Quern v. Jordan, 440 U.S. 332, 346 n.18 (1979) ("On remand, the Circuit Court may consider and decide any matters left open by the mandate of this court."). The circuit courts follow the same practice with remands to the district courts. *E.g., United States. v. Kellington*, 217 F.3d 1084, 1092–95 (9th Cir. 2000) ("on remand, courts are often confronted with issues that were never considered by the remanding court. In such cases, broadly speaking, mandates require respect for what the higher court decided, *not for what it did not decide*.") (emphasis added).

Petitioners cannot seriously suggest that *Scheidler II* addressed and decided whether the two-way or three-way interpretation of § 1951(a) is correct. They cite no passage in *Scheidler II* where the physical violence issue is even mentioned. *Sanford Fork*, *Sprague*, and *Quern* all demonstrate that the Seventh Circuit was not only free, but obligated, to address the physical violence issue on remand.

3. Petitioners' New Mandate Rule Would Create Needless Litigation in This Court. Not only does Petitioners' "violation-of-the-mandate" argument flout both the *Glover* and *Sanford Fork* lines of precedent, but it would also foster needless litigation in this Court and an extremely inefficient re-allocation of judicial resources. First, Petitioners' proposed rule would require every respondent to raise in this Court every conceivable alternative ground to support the lower court's judgment, whether or not those grounds were fairly included in petitioners' questions presented. If a respondent failed to do so, and if the Court's remand instructions did not explicitly direct the lower courts

to address such issues, under Petitioners' theory, all alternative grounds would be automatically extinguished, without any briefing or consideration of their merits.

This Court has never required prevailing parties to raise alternative grounds for affirmance; the rule in fact is the opposite. In *Yee*, the Court explained why this is so important: by limiting its consideration to the questions presented in the petition, the Court avoids forcing respondents to address other issues. 503 U.S. 519 at 535-36. Where, as here, "the decision below involves issues on which the petitioner does *not* seek certiorari, the respondent would face the formidable task of opposing certiorari on every issue the Court might conceivably find present in the case." *Id.* at 536. In fact, when respondents do raise alternative grounds, the Court generally refuses to consider them. *See, e.g., West*, 527 U.S. at 223; *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253–54 (1999).

Second, Petitioners' rule would exponentially increase the need for motions for clarification to this Court. Concerned that the lower courts might be foreclosed from further action absent specific instructions from this Court, parties would continually return to this Court seeking clarification about which unaddressed issues remained open on remand. By arguing that Respondents should have raised the physical violence issue by a motion for clarification to this Court, Petitioners ask for precisely this result.

Petitioner's new mandate rule would lead to an extremely inefficient re-distribution of the judicial workload between

this Court and the lower courts. This Court's practice of limiting its review to specified questions grows out of its need to "husband its scarce adjudicatory resources for the most fundamental constitutional and statutory questions, along with an occasional question of federal common law, sparing such additional energy as it can muster to seek as much uniformity as possible on lesser questions." 16B Charles Alan Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 4001, 4 (2d ed. 1996). Forcing this Court to foresee and enumerate – or address on "clarification" motions – every conceivable remaining issue involved in each case it reviews would upset this careful balance. As this Court emphasized in *Yee*, 503 U.S. at 536:

> To use our resources most efficiently, we must grant certiorari only in those cases that will enable us to resolve particularly important questions. Were we routinely to entertain questions not presented in the petition for certiorari, much of this efficiency would vanish, as parties who feared an inability to prevail on the question presented would be encouraged to fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted. Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important, thus enabling us to make efficient use of our resources.

The lower courts, which consider the entire bundle of issues that each case entails, are particularly well suited to determine what, if anything, remains to be resolved on

remand. Petitioners' approach would waste this Court's scarce resources and impose the burden of making this broad-ranging analysis on this Court, which has historically chosen not to spend its valuable time doing so.

4. Petitioners' Waiver Argument is Baseless. Petitioners blame everyone but themselves for their failure to raise the physical violence issue in *Scheidler II*. They argue that even though they made no mention of the question in their merits briefs in *Scheidler II*, Respondents somehow "waived" the physical violence issue by not raising it affirmatively in *their* merits brief. This argument distorts the law of waiver beyond recognition and ignores this Court's practice of declining to decide issues outside the questions presented.

Respondents' Brief in Opposition to the *Scheidler II* petitions for *certiorari* noted that the 4 acts involving physical violence were unchallenged by Petitioners. 01-0118, 01-0119 Br. In Opp'n. 4, 7. When the Court granted *certiorari* on two limited questions that did not include the physical violence issue – and after Petitioners' opening merits briefs said not a word about it – Respondents had no reason to address the issue.

Although a respondent is *permitted* to raise any alternative grounds for affirmance, there is no requirement that a party who prevailed below raise arguments outside the scope of the questions presented. In fact, as noted above at 21, one of the chief purposes of Rule 14.1(a) is to make efficient use of this Court's scarce resources and relieve the

respondent of "the expense of unnecessary litigation on the merits." *Yee*, 503 U.S. at 536.

Even when respondents do raise alternative arguments for affirmance, the Court typically refuses to consider them, deferring to the lower courts in the first instance. *See e.g.*, *West*, 527 U.S. at 223 (refusing to consider alternative bases outside the question presented in the petition for certiorari); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (same).

The Scheidler Petitioners imply that the physical violence question was somehow "fairly included" in the questions they chose to present for review in *Scheidler II* and on which this Court granted *certiorari*. But their failure even to address the physical violence issue in their merits brief in *Scheidler II* undermines their argument and reveals that it is only a post-hoc rationalization for their omission. Furthermore, any such conclusion would violate settled principles regarding this Court's practice. Determining whether acts or threats of physical violence must involve robbery or extortion to violate the § 1951(a) would not assist in resolving the questions on which the Court granted *certiorari* in *Scheidler II*, [6] nor was it, like the state law and Travel Act extortion issues, inevitably controlled by those issues. *See Yee*, 503 U.S. at 537 (issue that would not assist in resolution of questions

---

[6] "We granted *certiorari* in these cases to answer two questions. First, whether petitioners committed extortion within the meaning of the Hobbs Act, 18 U.S.C. § 1951. Second, whether respondents, as private litigants, may obtain injunctive relief in a civil action pursuant to 18 U.S.C. § 1964 of [RICO]." OR. App. 32a.

presented and that was not subsidiary to questions presented was not "fairly included therein"); *see also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (question that is "merely complementary or related to the question presented in the petition for certiorari is not fairly included therein.") This Court made that point clear by resolving the extortion question in *Scheidler II* without so much as mentioning the 4 physical violence predicates or the statutory construction argument Petitioners now urge.

B. The Seventh Circuit Opinion is a Not a Final Judgment, and this Case is Not a Proper Vehicle for Deciding the Remaining Questions Presented

Petitioners also seek a writ of *certiorari* on the physical violence issue itself, and whether injunctive relief is available to private RICO litigants. In its current posture, however, this case is not a proper vehicle for addressing these questions. The Seventh Circuit decisions from which Petitioners seek a writ do not resolve these issues against them; the orders merely remand to the trial court to determine, in the first instance, whether the physical violence predicates could support an injunction. Contrary to Petitioners' contention, the Seventh Circuit expressly declined to decide whether the two-way or three-way interpretation of the Hobbs Act is correct. The court unequivocally left that question to be addressed first by the district court, and only if the district court were to find an injunction otherwise warranted.

In determining whether an injunction is warranted, the district court will need to resolve several factual issues, any one of which could end this case without any court deciding the questions presented. Therefore, *certiorari* should not be granted on the physical violence or injunction issue until – and unless – the lower courts resolve all the remaining issues in Respondents' favor.

1. This Court Disfavors Taking *Certiorari* Over Cases Remanded by the Court of Appeals Prior to Final Judgment. In *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), the Court explained that "[t]he decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application." *Id.*

Ever since *Hamilton-Brown*, this Court has followed this pragmatic practice of denying *certiorari* from circuit court decisions remanding cases to the district court. In *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967), the Court denied a writ of *certiorari*, stressing that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." Similarly, in *Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993), the Court denied *certiorari* where the court of appeals had vacated the judgment and remanded to the district court "for determination of an appropriate remedy." (Scalia, J., concurring.) "We generally await final judgment in the lower

courts before exercising our certiorari jurisdiction. I think it prudent to take that course here." *Id.*

This case presents a non-final remand indistinguishable from *Virginia Military Institute* and *Brotherhood of Locomotive Firemen*. The Seventh Circuit's orders have remanded this case to the district court "to determine whether the four predicate acts involving 'acts or threats of physical violence to any person or property' are sufficient to support the nationwide injunction that it imposed." Sch. App. 28a. This Court should follow its long-standing practice of allowing the lower courts to make a final judgment before considering a writ of *certiorari*.[7]

---

[7] Nor is mandamus appropriate. OR has not invoked this Court's jurisdiction under the All Writs Act, and it nowhere requests such a writ. Only the Scheidler Petitioners mention mandamus, and they do not explicitly seek it; they merely mention mandamus "[i]n an abundance of caution." Sch. Pet. 14 n. 6. The Scheidler Petitioners' passing references, Sch. Pet. at 1, 12, 14 n.6, do not begin to satisfy this Court's stringent requirements for mandamus. *Cheney v. United States District Court*, __ U.S. __, 124 S. Ct. 2576, 2586 (2004) (mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes").

Most importantly, the Scheidler Petitioners have failed to serve their petition on the parties against whom mandamus is sought. In a mandamus action, the judges of the lower court are parties to the litigation, and they are entitled to notice, representation by counsel, and an opportunity to respond. Sup. Ct. R. 20.3. The Scheidler petition was served only on counsel for Operation Rescue and Respondents; the Seventh Circuit has not been served nor given the requisite opportunity to respond. Sch. Pet. Cert. Serv. This is fatal to their request for mandamus. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427 (1978). So, too, was their decision to caption their case as a request only for *certiorari*. Supreme Court Rule 20.2 requires mandamus petitions be styled "In re: petitioner."

2. No Court has Yet Addressed the Physical Violence Issue in this Case. Although Petitioners imply otherwise, the Seventh Circuit has not yet decided whether the physical violence prong of the Hobbs Act requires a connection to robbery or extortion. Instead, it remanded to the district court for consideration in the first instance. Sch. App. 6a-7a ("We take this opportunity to underscore the fact that we have not, at this point, ruled either implicitly or explicitly on the Hobbs Act issue, for reasons of judicial economy and restraint."). Nevertheless, Petitioners proceed as though the Seventh Circuit has decided this issue – and decided it against them. They argue, for example, that the Seventh Circuit's remand order creates a circuit split with the Ninth Circuit's *United States v. Yankowski*, 184 F.3d 1071 (1999). This argument is wholly disingenuous.[8]

The Scheidler Petitioners also fail the substantive requirements of Sup. Ct. R. 20.1, which provides that a petitioner must show that (1) the writ will be in aid of the Court's appellate jurisdiction; (2) exceptional circumstances warrant the exercise of the Court's discretionary powers; and (3) adequate relief cannot be obtained in any other form or from any other court. Sup. Ct. R. 20.1; Sup Ct. R. 20.3(a) ("A petition seeking … a writ of mandamus … shall set out with particularity why the relief sought is not available in any other court"). The Scheidler Petitioners fail on all three grounds. In particular, they have not made any showing – nor could they – that they are unable to obtain adequate relief from the district court in this case. The Scheidler Petitioners' have not sufficiently invoked the Court's mandamus jurisdiction under 28 U.S.C. § 1651.

[8] Petitioners also argue that the Seventh Circuit's decision is in conflict with an official interpretation of the United States, citing to a Department of Justice Criminal Resource Manual from 1997. They fail to note, however, that in 1999 the Government took the opposite position. *Yankowski*, 184 F.3d at 1072.

Nor has the Seventh Circuit prejudged the outcome on remand, as Scheidler implies. Sch. Pet. 18. The Seventh Circuit's discussion of this statutory construction issue merely illustrates that the question is far from easy or obvious, as Petitioners pretend. Sch. App. 8a. It shows that Petitioners' facially simple answers contain some apparent – although not necessarily fatal – flaws, and why certain passages of *Scheidler II* did not somehow subtly prove that this Court had adopted the two-way interpretation, as Petitioners urged. Sch. App. 9a. *See, e.g.*, Sch. App. 16a ("[T]he brief discussion we have included in this opinion demonstrates that the issue is a complex one that deserves not only full briefing and participation by all parties, but also input from the United States.") As a court of review itself, the Seventh Circuit concluded that principles of judicial economy required that the district court examine the issue first, focusing on the facts that the jury and trial court found – a function that the trial court is uniquely able to handle. If this Court granted *certiorari* on the physical violence issue, it would be the first court in this case to decide that question, something this Court generally takes care to avoid. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) ("we ordinarily do not decide in the first instance issues not decided below"). *See also Austin v. United States*, 509 U.S. 602, 622 (1993) ("prudence dictates letting the lower courts decide an issue first").

3. This Case Might Be Resolved in Petitioners' Favor on Other Grounds Below. This Court's practice of not granting writs of *certiorari* over non-final orders is especially

appropriate here. On remand, the district court might well resolve the case in Petitioners' favor on any number of grounds without ever reaching either of the questions Petitioners urge this Court to decide. For example, the Seventh Circuit instructed the district court to consider whether the 4 physical violence predicates found by the jury would be sufficient to support a modified injunction and expressed some skepticism on the subject: "it seems possible (perhaps even likely) that the district court might come to the conclusion that the 4 acts of physical violence are not sufficient standing alone to justify any injunction at all." Sch. App. 7a. If the district court decides that the physical violence predicates are *not* sufficient to support an injunction, there will be no need to resolve the statutory interpretation issues.

Petitioners could also prevail below on other grounds. For example, the district court might find that the physical violence do not constitute a "pattern" under 18 U.S.C. § 1962(c); or that no two of the acts were committed within a ten-year period, 18 U.S.C. § 1961(5); or that the physical violence predicates alone did not affect interstate commerce as required. All of these factual issues remain open under the special interrogatories answered by the jury and will have to be addressed by the trial court on remand. Sch. App. 190a–195a.

A decision by the district court in Petitioners' favor on any one of these or other issues could moot not only the physical violence question, but also the RICO injunction question that Petitioners now urge this Court to take, and thus

effectively end this litigation without any court needing to decide either of these two issues. Given that these issues might prove irrelevant to the resolution of this case, it is a particularly inappropriate vehicle for resolving them. This Court, therefore, should adhere to its long-standing practice of denying *certiorari* where the writ is sought from a non-final remand order by the circuit court.

CONCLUSION

The petitions should be denied.

Fay Clayton*
Susan Valentine
Adam Hirsch
Robinson Curley & Clayton, P.C.
300 South Wacker Drive
Suite 1700
Chicago, IL 60606
(312) 663-3100

Lowell E. Sachnoff
Casey Westover
Sachnoff & Weaver, Ltd.
10 South Wacker Drive
Suite 4000
Chicago, IL 60606
(312) 207-1000

May 11, 2005

**Counsel of Record*

Attorneys for Respondents

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 01-1118 & 01-1119

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, and THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners
v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

and

OPERATION RESCUE,
Petitioner
v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

ON WRITS OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

THESE CAUSES came on to be heard on the transcript of the record from the above court and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in these causes is reversed with costs, and the cases are remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court.

IT IS FURTHER ORDERED that the petitioners Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and The Pro-Life Action League, Inc., and Operation Rescue recover from National Organization for Women, Inc., et al., One Thousand Nine Hundred Fifty Dollars and Fifty Cents ($1,950.50) for costs herein expended.

January 15, 2003

Printing of record:	$1,350.50	(to be paid to Operation Rescue)
Clerk's costs:	600.00	($300.00 to be paid to each set of petitioners)
Total:	**$1,950.50**	

Nos. 99-3076, 99-3336, 99-3891, 99-3892, and 01-2050

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NATIONAL ORGANIZATION FOR WOMEN, INC., for its women members and the class of all other women who are not NOW members and whose right to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities, DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other women's health centers in the United States at which abortions are performed,	)	**On Remand from the United States Supreme Court**
Plaintiffs-Appellees,	)	**On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 86 C. 7888, Hon. David H. Coar, Judge Presiding.**
vs.	)	
JOSEPH SCHEIDLER, PRO-LIFE ACTION LEAGUE, INC., ANDREW SCHOLBERG, TIMOTHY	)	

MURPHY, and OPERATION RESCUE,

Defendants-Appellants.

CIRCUIT RULE 54 STATEMENT OF DEFENDANT-APPELLANTS JOSEPH SCHEIDLER, PRO-LIFE ACTION LEAGUE, INC., ANDREW SCHOLBERG, AND TIMOTHY MURPHY

Defendants-appellants, Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and the Pro-Life Action League, Inc. ("the League"), state their position as to the action which ought to be taken by this Court on remand from the United States Supreme Court as follows:

After suffering nearly 17 years of arduous litigation under the federal antitrust and racketeering (RICO) laws, these defendants-appellants respectfully submit that on February 26, 2003, the Supreme Court sounded what ought to prove the death knell of this case, as follows:

> "Because of all of the predicate acts, supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated" (*Scheidler v. NOW*, 123 S.Ct. 1057, 1069).

These Defendants-appellants thus adopt the Circuit Rule 54 Statement of their co-defendant-appellant, Operation Rescue, and they join with Operation Rescue in urging that

the Court reverse the judgment below (in Nos. 99-3076, 99-3336, 99-3891, and 99-3892), vacate the permanent injunction, and remand with instructions that the district court enter judgment for defendants-appellants. They urge, too, that their appeal in No. 01-2050 from the district court's denial of their motion for post-judgment relief will become moot upon this Court's reversal of the August, 1999, judgment for plaintiffs-appellees.

Respectfully submitted this 18th day of April, 2003.

/s/ Thomas Brejcha

One of the attorneys for defendants-appellants

Of counsel:
Thomas Brejcha
Deborah Fischer
29 South LaSalle Street – Suite 440
Chicago, Illinois 60603
Tel. 312-782-1680
Fax 312-782-1887

Nos. 99-3076, 99-3336, 99-3891, 99-3892, and 01-2050

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,	)	**Appeals from the United States District Court for the Northern District of Illinois, Eastern Division, No. 86 C. 7888, Hon. David H. Coar, Judge (on remand from U.S. Supreme Court)**
Plaintiffs-Appellees,	)	
	)	
v.	)	
	)	
JOSEPH SCHEIDLER, et al.,	)	
Defendants-Appellants.	)	

CIRCUIT RULE 54 STATEMENT OF
DEFENDANT-APPELLANT OPERATION RESCUE

Jay Alan Sekulow
Walter M. Weber
(Counsel of Record)
American Center for Law and Justice
1650 Diagonal Road, 5th Floor
Alexandria, VA 22314
(703) 740-1450

Vincent P. McCarthy
American Center for Law and Justice
8 S. Main Street
New Milford, CT 06776
(860) 355-1902

Larry L. Crain
American Center for Law and Justice
Suite 402
5214 Maryland Way
Brentwood, TN 37027
(615) 376-2600

Attorneys for Defendant-Appellant Operation Rescue

CIRCUIT RULE 54 STATEMENT OF DEFENDANT-APPELLANT OPERATION RESCUE

This case is on remand from the U.S. Supreme Court. Pursuant to Seventh Circuit Rule 54, defendant-appellant Operation Rescue (OR) submits this statement regarding appropriate disposition of this case. As explained below, this Court should reverse and remand with directions to enter judgment for defendants-appellants.

Procedural recap

After this case went to trial on the RICO claims of plaintiffs-appellees (NOW et al.), the jury rendered a verdict finding that defendants-appellants were liable for damages under RICO, based upon predicate counts of state and federal extortion. Appendix of Defendant-Appellant Operation Rescue ("OR Appx.") at 138-42. The district court granted a permanent injunction (D1296-99)[1] and entered final judgment for NOW et al. (D1324-26). Defendants-appellants Scheidler et al. and defendant-appellant OR filed separate appeals,[2] which this Court consolidated, Orders of Sept. 28, 1999 and Nov. 18, 1999 (Nos. 99-3076, 99-3336, 99-3891, 99-3892). The district court subsequently denied post-judgment relief (D1444), and defendants-appellants filed another appeal (No. 01-2050), which this Court consolidated with the prior appeals, Order of May 18, 2001.

[1] "D" refers to the district court docket number.

[2] The procedural history is set forth in greater detail in the Brief and Short Appendix for Defendant-Appellant Operation Rescue (pp. 1-4).

This Court affirmed the judgment of the district court, *NOW v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), and denied rehearing and rehearing en banc, Order of Oct. 29, 2001.

The Supreme Court granted certiorari, *Scheidler v. NOW*, 535 U.S. 1016 (2002), and reversed, *Scheidler v. NOW*, 123 S. Ct. 1057 (2003).

Supreme Court disposition

The Supreme Court was explicit in its disposition of this case. The Court held that there was "no basis upon which to find that [defendants-appellants] committed extortion under the Hobbs Act," *Scheidler*, 123 S. Ct. at 1068, that the state extortion predicates were "fatally flawed," *id.* At 1069, and that the Travel Act counts "also fail," *id.* The Court then concluded:

> Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated.

Id.

Appropriate disposition in Seventh Circuit

In light of the Supreme Court's express directions, this Court should now reverse the judgment below (in Nos. 99-3076, 99-3336, 99-3891, & 99-3892), vacate the permanent injunction, and remand with instructions to enter judgment for defendants-appellants. As to the appeal in No.

01-2050, which is an appeal from the denial of post-judgment relief, the overturning of the underlying judgment renders that appeal moot. Accordingly, the appeal in No. 01-2050 should be dismissed as moot.

Conclusion

WHEREFORE, in Nos. 99-3076, 99-3336, 99-3891, & 99-3892, this Court should REVERSE the judgment, VACATE the permanent injunction, and REMAND with instructions to enter judgment for defendants-appellants. In No. 01-2050, this Court should DISMISS the appeal as MOOT.

Respectfully submitted this 16th day of April, 2003.

/s/ Walter M. Weber
Jay Alan Seklow
Walter M. Weber
(Counsel of Record)
American Center for Law and Justice
1650 Diagonal Road, 5th Floor
Alexandria, VA 22314
(703) 740-1450

Vincent P. McCarthy
American Center for Law and Justice
8 S. Main Street
New Milford, CT 06776
(860) 355-1902

Larry L. Crain
American Center for Law and Justice
5214 Maryland Way, Suite 402
Brentwood, TN 37027
(615) 376-2600

Attorneys for Defendant-Appellant Operation Rescue

Nos. 99-3076, 99-3336, 99-3891, 99-3892, and 01-2050

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*, **Plaintiffs,**	)	**On Remand from the United States Supreme Court**
v.	)	**Nos. 01-1118 and 01-1119**
JOSEPH SCHEIDLER, et al., **Defendants.**	)	

PLAINTIFFS' CIRCUIT RULE 54 STATEMENT OF POSITION

Plaintiffs, the National Organization for Women, *et al.*, make this Statement of Position pursuant to Circuit Rule 54:

1. **The Supreme Court's Opinion and Remand Order**

On February 26, 2003, the Supreme Court issued an Opinion in these consolidated cases, reversing this Court's ruling with regard to the extortion-based predicate acts under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). On March 28, 2003, the Supreme Court issued an order remanding these consolidated cases to this Court for further proceedings, in conformity with that Opinion (Exhibit A hereto).

The Supreme Court's February 26 Opinion expressly left open the issue whether injunctions are available to private parties under RICO. Therefore, this Court's October 2, 2001, Opinion, holding that injunctions are available under RICO in private-party cases, such as this, remains undisturbed on this point.

Although the Supreme Court's February 26 Opinion disposed of the 117 extortion-based predicate acts, including both the Hobbs-Act-based extortion acts on which this Court's decision turned and state-law and Travel Act extortion, which this Court did not address, Defendants-Petitioners did not seek a *writ of certiorari* on the non-extortion-based predicate acts found by the jury. Accordingly, the Supreme Court made no ruling on the remaining category of predicate acts, namely, "acts or threats of physical violence, to any person or property." The jury found four (4) such acts, *see* Jury Verdict, ¶4(e), for a total of 121 predicate acts under RICO (Exhibit B hereto).[1]

As Plaintiff-Respondents noted in their Brief in Opposition to the petition for *certiorari* in the Supreme Court, at 5 n.4, 15, *see also* Respondents' Brief, at 3, 3 n.4, the predicate acts involving physical violence were an entirely separate category from the extortion-based crimes. The four physical-violence predicate acts do not rest on any

---

[1] The Supreme Court's Opinion discussed 117 of the 121 predicate acts that the jury found. *See Scheidler v. National Organization for Women*, ___ S. Ct. ___, 2003 WL 467549, at 3 (2003) (listing the categories of extortion-based predicate acts, which comprise 21, 25, 25, 23 and 23 acts in each of five categories, these total 117 predicate acts). It did not address the remaining four acts of threats or physical violence found by the jury.

definition of extortion, and therefore they are unaffected by the Supreme Court's recent Opinion.

2. The Appeal to This Court from the Jury Verdict and Judgment

After the jury returned its verdict on April 20, 1998, and the district court entered judgment in Plaintiffs' favor, Defendants raised a number of issues on appeal to this Court. Among those issues was a challenge to the predicate acts that involved physical violence. The physical violence issue was briefed and argued by the parties before this Court, but this Court declined to reach the physical-violence issue because Seventh Circuit extortion law had been so clear that the Court found no need to reach this issue. *See, e.g., United States v. Stillo,* 57 F.3d 553, 559 (7th Cir. 1995); *United States v. Anderson*, 716 F.3d 446, 450 (7th Cir. 1983). *See NOW v. Scheidler*, 267 F.3d 687, 709 (7th Cir. 2001). This Court was not presented with the question whether the predicate acts that involved physical violence would alone support an injunction.

3. Issues Yet to Be Resolved

The question remains, therefore, whether the remaining four predicate acts of physical violence for which the Defendants were found responsible are sufficient to support the RICO injunction issued by the district court, now that the extortion-based predicate acts have been removed by the Supreme Court's recent ruling. (Defendants waived any arguments regarding the physical violence predicate acts by choosing not to seek *certiorari* on this issue in the Supreme Court.)

Plaintiffs respectfully suggest that because the district court had no reason to (and therefore did not) address the question whether the physical-violence predicate acts on their own are sufficient to support the RICO injunction, the district court should be given the opportunity to determine whether an injunction continues to be warranted. In addition, the district court should be given the opportunity to address the question of what portion of the damages are sustained by the predicate acts of physical violence.

WHEREFORE, Plaintiffs respectfully suggest that the injunction should remain in place until the district court has had the opportunity to review these open issues, and that the case should be remanded to the district court for further proceedings. In the alternative, Plaintiffs ask that the Court affirm the jury's verdict and the judgment of the trial court with regard to the physical-violence predicate acts, and remand the case to the district court for further proceedings.

Respectfully submitted,

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.

Dated: April 17, 2003.

/s/ Fay Clayton
One of Plaintiffs-Appellees' Attorneys

Fay Clayton
Susan Valentine
Joyce A. Pollack
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive, Suite 1700
Chicago, Illinois 60606
Telephone: (312) 663-3100
Facsimile: (312) 663-0303

Lowell E. Sachnoff
Michael Richman
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive, Suite 2900
Chicago, Illinois 60606
Telephone: (312) 207-1000
Facsimile: (312) 663-0303

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Nos. 99-2076, 99-3336, 99-2891, 99-3892, & 01-2050

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Plaintiffs-Appellees, v. JOSEPH SCHEIDLER, et al., Defendants-Appellants.	)	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division, No. 86 C. 7888, Hon. David H. Coar, Judge (on remand from U.S. Supreme Court)

RESPONSE OF DEFENDANT-APPELLANT OPERATION RESCUE TO PLAINTIFFS' CIRCUIT RULE 54 STATEMENT OF POSITION

ARGUMENT

Plaintiffs-appellees National Organization for Women et al. ("NOW") have asked this Court to defy the U.S. Supreme Court. *See* Plaintiffs' Circuit Rule 54 Statement of Position ("NOW's Rule 54 Statement"). This Court should decline that invitation.

The Supreme Court's judgment ordered that this Court's prior judgment be "reversed" and the case "remanded . . . for further proceedings *in conformity with the opinion of this [Supreme] Court*." Judgment of Supreme Court (Ex. A to NOW's Rule 54 Statement) (emphasis added). Yet NOW urges this Court to reject the express directions set forth in the Supreme Court's opinion.

The Supreme Court held that "the injunction issued by the district court must necessarily be vacated." *Scheidler v. NOW*, 123 S. Ct. 1057, 1069 (2003). In flat contradiction of this, NOW says that the injunction "should remain in place." NOW's Rule 54 Statement at 4. The Supreme Court held that "*all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," and that "the *judgment that petitioners violated RICO must also be reversed*," 123 S. Ct. at 1069 (emphasis added). In flat contradiction of this, NOW argues that four of the predicate acts "are unaffected by the Supreme Court's recent Opinion," NOW's Rule 54 Statement at 2, that the Supreme Court "did not address" these four predicates, *id.* at 2 n.1, and that these predicates are "remaining" and may "sustain[]" damages or injunctive relief, *id.* at 3. Amazingly, NOW asks this Court to "affirm the jury's verdict and the judgment of the trial court with regard to [these] predicate acts," *id.* at 4.

NOW's remarkable request meets with several fatal obstacles.

First, the Supreme Court's judgment and opinion clearly preclude the disposition NOW seeks, as set forth above.

Second, NOW did not seek rehearing in the Supreme Court. NOW's position essentially is that the Supreme Court goofed when it ruled that "*all* of the predicate acts" must be reversed, because - - according to NOW - - that Supreme Court supposedly overlooked the four predicate acts that NOW claims survived the Supreme Court's reversal. NOW thus asks *this Court* to correct the *Supreme Court's* supposed oversight. The Supreme Court did not err, however: there is

no predicate act of "violence" as such. *See infra* pp. 3-4. Moreover, the correction NOW seeks, even if it were warranted, would be the exclusive prerogative of the Supreme Court, not this Court. NOW, however, did not even bother to ask the Supreme Court, via a petition for rehearing, to correct the supposed oversight NOW identifies.

Third, the Supreme Court, as NOW points out, NOW's Rule 54 Statement at 1-2, did not reach the question whether private parties can obtain injunctive relief under RICO. But the sole reason the Supreme Court did not reach the issue was that there was *no underlying RICO violation*, 123 S. Ct. at 1069 ("Without an underlying RICO violation, the injunction . . . must necessarily be vacated. We therefore need not address the second question presented - - whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. §1964"). NOW claims the Supreme Court goofed here as well, because the Court's premise - - that there were no predicate acts remaining - - was supposedly erroneous. Again, NOW is mistaken in charging the Supreme Court with error. Moreover, NOW failed to take this issue up with the Supreme Court in a petition for rehearing, and NOW has no business asking this Court to "fix" the Supreme Court's opinion.

Fourth, even if it were proper for this Court to disregard the judgment and opinion of the Supreme Court, NOW's theory would provide no warrant for doing so. NOW claims that the Hobbs Act outlaws "physical violence" wholly apart from extortion or robbery. NOW's Rule 54 Statement at 2 ("non-extortion-based predicate acts"). The text of the Hobbs Act supports no such claim. *See* 18 U.S.C.

§ 1951(a). Indeed, a court would have to ignore the rules of grammar to twist the Hobbs Act to fit NOW's construction.[1] NOW cites no case authority for its position, and the only case addressing the issue is to the contrary, *see United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999). *See also* Corrected Reply Brief for Defendant-Appellant Operation Rescue (7th Cir. May 10, 2000) at 16-17 (demonstrating

[1] The Hobbs Act, 18 U.S.C. § 1951(a), may properly be parsed as follows (bracketed material and indentations added):

> Whoever
>
> > [i] in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or
> >
> > [ii] attempt or conspires so to do [i.e., to violate part i], or
> >
> > [iii] commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section [i.e., parts i or ii]
>
> shall be fined under this title or imprisoned not more than twenty years, or both.

Plainly, each of the three prongs of the offense relates, either expressly or by cross-reference, to robbery or extortion. NOW's purported construction, by contrast, lacks grammatical parallelism, is awkward, and is incapable of coherent parsing.

meritlessness of NOW's argument).[2]

CONCLUSION

Hence, for the reasons set forth in the Circuit Rule 54 Statement of Defendant-Appellant Operation Rescue, this Court should, in Nos. 99-3076, 99-3336, 99-3891, & 99-3892, REVERSE the judgment, VACATE the permanent injunction, and REMAND with instructions to enter judgment for defendants. In No. 01-2050, this Court should DISMISS the appeal as MOOT.

Respectfully submitted this 23rd day of April, 2003.

/s/ Walter M. Weber
Jay Alan Sekulow
Walter M. Weber
(Counsel of Record)
American Center for Law and Justice
1650 Diagonal Road, 5th Floor
Alexandria, VA 22314
(703) 740-1450

[2] NOW itself conceded the connection between all of the alleged Hobbs Act predicates and extortion when it contended in the Supreme Court that "*each of the Hobbs Act violations* was also the basis for a finding as to state *extortion* laws," Brief of Respondents at 3 n.4 (emphasis added). *See also id.* (describing the 121 predicates as "state and federal *extortion* acts") (emphasis added). Moreover, the jury was instructed on "Federal law extortion, Hobbs Act," Tr. 4944, not on "non-extortion-based Hobbs Act" predicates. "Physical violence" was relevant only as an *element of extortion*, not as an independent predicate.

Vincent P. McCarthy
American Center for Law and Justice
8 S. Main Street
New Milford, CT 06776
(860) 355-1902

Larry L. Crain
American Center for Law and Justice
5214 Maryland Way, Suite 402
Brentwood, TN 37027
(615) 376-2600

Attorneys for Defendant-Appellant Operation Rescue

Nos. 99-3076, 99-3336, 99-3891, 99-3892, and 01-2050

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*, **Plaintiffs,**	)	**On Remand from the United States Supreme Court**
v.	)	**Nos. 01-1118 and 01-1119**
JOSEPH SCHEIDLER, et al., **Defendants.**	)	

PLAINTIFF-APPELLEES' REPLY IN SUPPORT OF RULE 54 STATEMENT

As a threshold matter, Operation Rescue ("OR") argues against the Rule 54 Statement of Position of the National Organization for Women, Inc., *et al.* ("NOW") because, OR says, the Supreme Court has the "exclusive prerogative" to address any issues relating to its opinion. OR cites no authority for the proposition that only the Supreme Court can address the scope of its opinion, and OR is wrong in this regard for several reasons.

First, Petitioners OR and Joseph Scheidler, *et al.* ("Scheidler") each filed petitions for writs of *certiorari* in which they chose *not* to seek the Supreme Court's review of the jury's finding that they were responsible for the four (4) acts or threats of physical violence in addition to the 117

predicate acts of extortion.[1] Second, the Supreme Court's grant of *certiorari* was limited to two questions: (a) the meaning of "extortion," and (b) whether private parties may obtain injunction relief under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Third, none of the Petitioners' briefs in the Supreme Court even addressed the four (4) acts involving physical violence. Fourth, the Supreme Court's opinion carefully toted up the extortion-based predicate acts at 117, omitting any reference whatsoever to the four additional non-extortion predicate acts, which made the total of predicate acts found by the jury equal 121.

The law is clear that when a judgment is reversed and remanded, as here, it is for the lower courts to determine which issues are left for further disposition. In response to other reversals of circuit rulings, the Courts of Appeal recognize that claims not expressly precluded by the Supreme Court remain for the lower courts to deal with on remand, *e.g., Illinois Council on Long Term Care v. Shalala,* No. 97-2317, 2000 WL 689693 at *1 (7th Cir. May 25, 2000), ruling that "the Medicaid-related claims, however, were not before the Supreme Court and our disposition of those claims, however, were not before the Supreme Court and our disposition of those claims, therefore, is unaffected." A prominent treatise succinctly summarizes the rule: "If the [Supreme] Court reverses a judgment, only those portions of the judgment that the Court addresses and decides are

[1] As we noted in our Rule 54 Statement, the viability of these non-extortion predicate acts was briefed and argued in this Court, *see* NOW, *et al.*'s Appellee Brief at 27-29 (a copy is attached for the Court's convenience).

affected." *Moore's Federal Practice* § 408.100(4) (3d Ed. 2002).

Here, the Supreme Court ordered that this Court's prior judgment be "reversed and the case be remanded . . . . for further proceedings in conformity with the Opinion of this Court." Because Petitioners never sought the Supreme Court's review of the jury's finding of the predicate acts involving physical violence, and because the Supreme Court neither granted *certiorari* nor ruled on those four predicate acts, four of the 121 predicate acts remain unaffected.[2] This Court, therefore, has jurisdiction to address the significance of the four undisturbed predicate acts and determine whether they are an independent basis for the injunction and damages ordered by the district court and affirmed by this Court in its opinion of October 2, 2001.

While it concedes that the Supreme Court left open the question whether a private RICO plaintiff may seek injunctions, OR argues that the Supreme Court's judgment irrevocably bars injunctive relief here. OR is wrong again. Although the Court held that without an underlying RICO violation, "the injunction . . . must necessarily be vacated," that statement was made in the context of the reversal of 117 of the 121 predicate acts. The Court's statement that there

[2] OR's argument that we should have sought "rehearing" misses the mark. The Supreme Court's opinions *did not reach* the predicate acts involving physical violence. It is neither appropriate nor necessary to ask for "rehearing" on an issue that was neither raised nor addressed in the first place.

was "no underlying RICO violation that could support an injunction" obviously refers to the 117 extortion-based predicate acts that the Court enumerated and which it held did not constitute extortion. The four acts or threats of physical violence were not raised in the Supreme Court by OR or Scheidler nor addressed by the Court; whether these unchallenged acts are sufficient to support the judgment should be addressed in the first instance by the district court, as we showed in our Rule 54 Statement.

The Supreme Court's opinion in this case was meticulous in addressing extortion-based predicate acts. In an odd locution, OR portrays NOW's argument as if we contend that the Supreme Court "goofed" by failing to address and dispose of the non-extortion predicate acts on which a writ of *certiorari* was neither sought or granted. However, the Supreme Court has repeatedly emphasized that it is not in the business of reaching out to decide issues not brought before it, let alone giving advisory opinions about them. "And it is quite clear that the oldest and most consistent thread in the federal law of judiciability is that the federal courts will not give adversary opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (internal quotations omitted). The Supreme Court does not "goof" by hewing to this long-standing practice.

Respectfully submitted,

/s/ Fay Clayton
One of Plaintiffs-Appellees' Attorneys

Dated: April 28, 2003.

Fay Clayton
Susan Valentine
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive, Suite 1700
Chicago, IL 60606
(312) 663-3100 Telephone
(312) 663-0303 Facsimile

Lowell E. Sachnoff
Michael Richman
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive, Suite 2900
Chicago, Illinois 60606
(312) 207-1000 Telephone
(312) 207-6400 Facsimile

(2)

Supreme Court, U.S.
FILED
MAY 24 2005
OFFICE OF THE CLERK

No. 04-1244

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

THOMAS BREJCHA
DEBORAH FISCHER
CHRISTOPHER M. HENNING
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
1880 S. Redwood Street
Escondido, CA 92025
(760) 737-7181

ALAN UNTEREINER*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The Decision Below Is Contrary To This Court's Unambiguous Mandate in *Scheidler II* 1

II. The Hobbs Act Issue Warrants Review 6

III. The RICO Injunction Issue Merits Review 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases:

Ballard v. *Commissioner*, 125 S. Ct. 1270 (2005) 4

City of Sherrill v. *Oneida Indian Nation*, 125 S. Ct. 1478 (2005) 4

Estate of Wilson v. *Aiken Indus.*, 439 U.S. 877 (1978) 9

Griffin v. *United States*, 502 U.S. 46 (1991) 9

NAACP v. *Alabama*, 357 U.S. 449 (1958) 8

Scheidler v. *NOW, Inc.*, 537 U.S. 393 (2003) ..... *passim*

United States v. *Enmons*, 410 U.S. 396 (1973) 6

United States v. *Milton*, 1998 WL 468812 (4th Cir. Aug. 4, 1998) 6

United States v. *Williams*, 504 U.S. 36 (1992) 8

United States v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999) 6

Statute, Rules and Regulation:

18 U.S.C. § 1964(c) 10

S. Ct. Rule 14.1(a) 4

7th Cir. Rule 54 7

TABLE OF AUTHORITIES—Continued

Page(s)

28 C.F.R. § 0.20(b) 6

Miscellaneous:

STERN, GRESSMAN, ET AL., SUPREME COURT PRACTICE (8th ed. 2002) 8

U.S. ATTORNEYS' MANUAL <available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.170> 6

REPLY BRIEF FOR PETITIONERS

In the petition, we showed that review is warranted both to bring the Seventh Circuit into compliance with the mandate in *Scheidler* v. *NOW, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*"), and to resolve conflicts on two other significant issues presented. Respondents do not deny the national importance of the Hobbs Act and RICO injunction issues presented, or the existence of serious conflicts in the circuits on those issues. Instead, they maintain that the Seventh Circuit's decision is somehow consistent with *Scheidler II* – despite this Court's commands that "all" the predicate acts "must be reversed" and the injunction "must be vacated" – and that this 19-year-old case is not yet ready for resolution of the Hobbs Act question. Those arguments should fail. For the reasons stated in the petition and below (and in Operation Rescue's petition and reply brief in No. 04-1352), as well as those in three *amicus* briefs filed by a wide array of governmental, labor union, organizational, and individual *amici*, summary reversal or plenary review is warranted.

I. The Decision Below Is Contrary To This Court's Unambiguous Mandate In *Scheidler II*

This Court gave clear instructions in remanding:

> Because ***all of the predicate acts*** supporting the jury's finding of a RICO violation ***must be reversed, the judgment that petitioners violated RICO must also be reversed.*** Without an underlying RICO violation, the *injunction* issued by the District Court ***must necessarily be vacated.***

537 U.S. at 411 (emphasis added in part). The Court's description of its own holding confirms its stated intention to invalidate not some but "all" of the RICO predicates – including the four predicates the Seventh Circuit thought might have somehow survived: "We further hold that our determination with respect to extortion under the Hobbs Act *renders insufficient* ***the other bases or predicate acts of racketeering*** supporting the jury's conclusion that petitioners violated RICO." 537 U.S. at 397 (emphasis added). Relying on its decision to invalidate *all* of

the underlying RICO predicates, the Court explained: "We therefore need not address the second question presented" concerning private RICO injunctions. *Id.* at 411.

Respondents do not even mention the crucial language of this Court's opinion until page 10 of their brief. When they finally do, they first claim that this Court's opinion contains "[n]ot one word" addressing the "4 predicate acts found by the jury premised on physical violence." Br. in Opp. ("Opp.") 10; see also *id.* at 17. But this Court's opinion says that "all" of the RICO predicates "must be reversed" – not "some," not "all the ones we have discussed," and certainly not "all but four." Although respondents suggest that "all of the predicate acts supporting the jury's finding of a RICO violation" really means "all of the *extortion-based* predicates" (Opp. 10 (emphasis added)), this Court's opinion contains no such qualifying language. And respondents do not, and cannot, deny that the four predicates they claim remain unaffected by *Scheidler II* were among those that "support[ed] the jury's conclusion that petitioners violated RICO." 537 U.S. at 397; *id.* at 411.

Respondents seek to change the terms of the debate. They emphasize an uncontested point – *Scheidler II* does not include a discussion of whether the Hobbs Act punishes acts or threats of violence that are unconnected to either robbery or extortion (an argument respondents unsuccessfully pressed at the petition stage of *Scheidler II* but abandoned at the merits stage). Opp. 15, 19. The critical issue, however, is not whether the Court's opinion analyzes this issue but *whether it disposes of these four claims.* As respondents emphasize, the Court's formal mandate required that the Seventh Circuit conduct any further proceedings "*in conformity* with the opinion of this Court." Opp. App. 1a (emphasis added). The Seventh Circuit's view that this Court *should have* discussed the four violence-only supposed predicates if it was going to reverse "all" the predicate acts is a criticism of this Court's opinion (suitable for a rehearing petition by a party), not conformity with this Court's opinion (suitable for a lower court following a mandate).

Had respondents filed a rehearing petition claiming that this Court had overlooked four of the predicate acts, they would have had to explain how their position could be reconciled with (1) the fact that the parties *repeatedly* and *prominently* referred to these four predicates at both the petition and merits stages;[1] (2) this Court's *rejection* of respondents' argument, at the petition stage, that review of the Hobbs Act issue should be denied because these four supposed predicates were *not* within the question presented and could serve as an independent basis for upholding the RICO judgment; (3) respondents' abandonment, at the merits stage, of any reliance on these four predicates; and (4) respondents' tactical decision to rely on an argument that *presupposed* that ***all of the Hobbs Act counts – including these four – were in fact related to extortion***. See Pet. 15-16. Not surprisingly, respondents elected not to seek rehearing but to take their chances with the panel that had previously ruled in their favor. That tactical choice should not be rewarded.

This Court's reasoned decision to avoid resolving the second question granted in *Scheidler II* – whether private injunctive relief is available under RICO – does not even receive the dignity of a mention on page 10 of the brief in opposition; rather, respondents (like the court below) simply ignore it. This Court's statement that it "need not" address the question of private injunctions under RICO rested on the premise that the

---

[1] See Pet. 15 (citing some references in the briefs); see also 01-1118 Response Br. of Operation Rescue 4-5 & n.3; 01-1118 Cert. Reply Br. 1-2; 01-1119 Cert. Reply Br. 1; 01-1118 and 01-1119 Scheidler Op. Br. 7 n.7; 01-1118 and 01-1119 Operation Rescue Op. Br. 3, 4 n.8, 5 n.10, 7 n.7, 32 n.34; 01-1118 and 01-1119 Resp. Br. 7 n.7; 01-1118 and 01-1119 Scheidler Merits Reply Br. 2; 01-1118 and 01-1119 Operation Rescue Merits Reply Br. 1, 2, 14-15. Many of these references were quite prominent. Thus, at both the petition and merits stages of *Scheidler II*, respondents sought to portray petitioners as having engaged in numerous violent protests over several decades. In response, petitioners repeatedly pointed out that *only four* of the Hobbs Act predicates involved acts or threats of violence. The rest were nonviolent.

injunction in this case "must necessarily be vacated" – a premise the Seventh Circuit saw fit to deny. 537 U.S. at 411.

Echoing the panel's reasoning, respondents next insist that the Court could not have resolved these four supposed Hobbs Act predicates because they fell outside the questions presented in *Scheidler II*. That argument rests on a mistaken premise. As previously explained, these four predicates *were* indeed "fairly included" within the questions presented because (as both sets of petitioners argued at the petition stage in that case) there is no such thing as a "violence only" crime under the statute. Pet. 15. Thus, contrary to respondents' suggestion (at 7), there was no need to "amend" the questions presented. Moreover, as respondents do not deny, the defective definition of "property" contained in the jury's instructions – which included "anything of value, including a woman's right to seek services from a clinic" (Pet. App. 182a) – applied with equal force to the four relevant Hobbs Act predicates and was the subject of extensive debate at the merits stage of *Scheidler II*. See Pet. 15-16.

Furthermore, the conclusion of respondents' argument does not follow from its premise. As previously explained (Pet. 17), this Court may go beyond the questions presented – and sometimes does so when necessary *properly to dispose of a case that is before it*. See, *e.g.*, *City of Sherrill* v. *Oneida Indian Nation*, 125 S. Ct. 1478, 1490 n.8 (2005); *Ballard* v. *Commissioner*, 125 S. Ct. 1270, 1275 n.2 (2005). Thus, in *Scheidler II* this Court saw fit to go beyond the questions granted to invalidate the *state* extortion counts underlying the RICO judgment (even though the Court had *denied review* of a separate question presenting that very issue). The panel therefore was simply wrong in refusing to "presume" that the Court "went beyond the scope of its grant of certiorari" (Pet. App. 5a) – the Court plainly *did so* with respect to the state counts. Contrary to respondents' suggestion, this is not an argument that this Court "disregard[s] * * * Rule 14.1(a)" (Opp. 16); as even the Seventh Circuit recognized, Rule 14.1 states only a "general rule" that is

subject to various recognized exceptions.[2] In any event, the Seventh Circuit had no more warrant to look behind the plain words of this Court's opinion – such as "all" and "must" – to analyze the Court's adherence to its own rules than a district court has to disregard an appellate mandate based on its analysis of what the court of appeals should have done in a particular case. That is not "conformity with the opinion of this Court."

Finally, respondents warn that if this Court enforces the clear meaning of its mandate in *Scheidler II*, it will create a "dramatic expansion" of "needless litigation in this Court" by "requir[ing] every respondent to raise in this Court every conceivable alternative ground" for affirmance and by "exponentially increas[ing] the need for motions for clarification." Opp. 17, 19, 20. The argument is worse than absurd. Our argument for summary reversal is based on the Seventh Circuit's failure to comply with particular language in this Court's opinion. Much as respondents wish to transmute our argument into one that "this Court held in favor of the 'two-way' rather than the 'three-way' reading of the Hobbs Act," Opp. 2, our position is in fact much simpler: "all" means all, and "must" means must, *whatever* the Court's reasons (procedural or substantive) for using those words in its opinion. Our position has implications for those cases – but only for those cases – in which lower courts determine that this Court did not really mean what it plainly said. We do not and need not espouse any general principle that respondents forfeit the right to raise any issues supporting the judgment below in any particular circumstances. The only general principle necessary to support our request for summary reversal is that courts instructed to act "in

---

[2] Respondents suggest (at 16-17) that the issue of whether "the meaning of extortion under the Hobbs Act controlled the meaning of that same word under state law" was "fairly included" in the questions presented in *Scheidler II*. They are mistaken. The Hobbs Act question granted in *Scheidler II* (see Pet. App. 3a) was limited to what the "Hobbs Act" means and made no mention of state law or the extent to which state-law predicates under RICO are required (by virtue of *RICO*, not the Hobbs Act) to conform to minimum federal standards.

conformity with the opinion of this Court" must act in strict conformity with the opinion, not excuse lack of conformity based on analysis of things the Court did not say.

II. The Hobbs Act Issue Warrants Review

Respondents' brief is most notable for what it does *not* say about the Hobbs Act issue. It does not deny that the Seventh Circuit seriously misread *United States* v. *Milton*, 1998 WL 468812 (4th Cir. Aug. 4, 1998). It does not defend the Seventh Circuit's egregious mischaracterization of the position of the government in that case. Pet. 24-25. It does not dispute that the panel overlooked the government's *rejection* of the "free-standing" reading of the final clause of the Hobbs Act in an official Justice Department publication. Pet. 25.[3] As for the conflicts we identified, respondents do not deny that the decision below, by holding that the Hobbs Act may plausibly be read to criminalize acts or threats of violence unconnected to either robbery or extortion, parts company with the decisions of two other circuits. Pet. 18-19; 04-1352 Pet. 8, 25-26. Neither do respondents dispute that the Seventh Circuit's decision conflicts in multiple respects with this Court's decisions in *Scheidler II*, *United States* v. *Enmons*, 410 U.S. 396 (1973), and a line of cases interpreting the 1948 revisions to Title 18. Pet. 19-22. And respondents do not deny – indeed, they concede as did the Seventh Circuit – that the Hobbs Act issue presented is of national importance. Opp. 12; Pet. App. 6a. The *amicus* brief of eight States dramatically confirms that the issue is, in fact, extremely important – even more so than the Seventh

---

[3] Respondents point out (at 27 n.8) that in *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999), which involved the attempted arson of an abortion clinic, the U.S. Attorney for Montana filed a brief that took a position contrary to that stated in 1997 in the Justice Department's Criminal Division Manual. Because the United States was the appellee, however, there was no need for Main Justice (through the Office of Solicitor General) to review or approve that brief before it was filed. See 28 C.F.R. § 0.20(b); U.S. ATTORNEYS' MANUAL § 9-2.170 <available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.170>. The government did not petition for rehearing.

Circuit conceded, and in ways that the court of appeals' extensive, yet substantively slapdash, analysis completely fails to account for.

Rather than offer *any defense at all* on the merits of the Hobbs Act question,[4] respondents elect to rely on a series of procedural objections. They make the Dickensian argument that the Hobbs Act issue is, after 19 years of litigation, "not yet ripe for consideration" because the Seventh Circuit indicated that it was not resolving it and because this issue has "never been decided by any court in this litigation." Opp. 3; see also *id.* at 27-28. Relatedly, respondents contend that "this case is not a proper vehicle" because the decision below lacks finality. *Id.* at 14, 24. Lastly, they argue that review should be denied because the Hobbs Act issue might be mooted by "factual determinations" made by the district court on remand. *Id.* at 3, 14, 25, 28-29. All of those arguments should be rejected.

First, respondents are wrong to say that the Hobbs Act issue is not yet ripe for consideration. As respondents concede (at 6), this issue was raised and briefed in the previous Seventh Circuit appeal. It was raised and briefed *again* in the Seventh Circuit in the Circuit Rule 54 and rehearing papers on remand from *Scheidler II*. The Seventh Circuit devoted 10 pages to discussing the arguments for and against respondents' unprecedented reading of the Hobbs Act. Thus, the court of appeals has had more than ample opportunity to address this question – and should have resolved it. Respondents also suggest that the *district court* never definitively ruled on the Hobbs Act issue. Opp. 3, 27, 28. Respondents fail to explain, however, how that submission can be reconciled with the

---

[4] In response to the rehearing petitions filed in the Seventh Circuit, respondents *did* attempt to defend the "violence only" reading of the Hobbs Act. Respondents also argued, incorrectly, that this issue had been waived – an argument the Seventh Circuit implicitly rejected by devoting ten pages to discussing the Hobbs Act question. (Respondents wisely abandoned their meritless waiver argument in this Court.) The relevant portion of respondents' answer to the rehearing petitions is reprinted in an appendix to this reply brief. See App., *infra*, 1a-7a.

record.[5] Even if respondents are correct that the district court never endorsed their strained reading of the Hobbs Act, that would only confirm that the Seventh Circuit's decision to remand this case for further proceedings based on an entirely new theory is indefensible and warrants summary reversal.

Equally mistaken is respondents' contention that review should be denied because the decision below lacks finality. This Court "has unquestioned jurisdiction to review interlocutory judgments of [the] federal courts of appeals." STERN, GRESSMAN, ET AL., SUPREME COURT PRACTICE 258 (8th ed. 2002). So long as an issue was *either raised or decided* in the court of appeals, this Court has discretion to review it even though the decision below is interlocutory. *United States* v. *Williams*, 504 U.S. 36, 41, 42-43 (1992). This Court has reviewed interlocutory decisions of the federal courts of appeals that raise "some important and clear-cut issue of law that is fundamental to the further conduct of the case." STERN & GRESSMAN, at 259 (citing numerous cases). This case fits squarely within that category.

And, given the age of this litigation, this Court should not deny review of the Hobbs Act issue merely because the Seventh Circuit refused (for a second time) to resolve the issue conclusively. Cf. *NAACP* v. *Alabama*, 357 U.S. 449, 457-58 (1958) (looking beyond adequate and independent state-law ground invoked by state court to decide issue). *Amici* Consistent Life *et al.* (at 4, 5) have invoked *Bleak House* in response to the Seventh Circuit's contention that "it would be imprudent to resolve this problem of statutory interpretation at this stage" (Pet. App. 15a). Petitioners, having believed they prevailed in this litigation in its entirety through an 8-1 decision of this Court in 2003, only to be told by the Seventh Circuit two years later that it is too soon to decide whether anything they did

---

[5] Petitioners clearly objected to the relevant jury instruction, and the trial court – in response to the argument of respondents' counsel that the Hobbs Act reaches freestanding acts or threats of violence – overruled this objection. See Tr. 4575-79 (reprinted at App., *infra*, 8a-10a).

violated the Hobbs Act, cannot help but think of the famous remarks of Mr. Bumble in *Oliver Twist*. See *Estate of Wilson* v. *Aiken Indus.*, 439 U.S. 877, 880 n.3 (1978) (Blackmun, J., concurring in the denial of certiorari).

Respondents are also wrong to suggest that review should be denied because the Hobbs Act issue might be mooted by other determinations made by the district court on remand. Opp. 3, 14.[6] Although it is certainly possible that the district court could resolve this case in petitioners' favor without deciding the Hobbs Act question, respondents pointedly decline in their brief to make any promise that they will refrain from taking a further appeal if that occurs. Nor do they provide any assurances that they will abandon the litigation of collateral matters that may necessitate the resolution of the Hobbs Act issue (such as their pending motion for costs, which they have not withdrawn). As the history of this litigation amply demonstrates, respondents will not accept defeat if there is any possible argument to be made to the contrary.

In any event, the possibility that this case could be resolved without a decision on remand by the district court on the Hobbs Act question provides more, not less, reason why this Court's review is needed. If the district court avoids the issue, the Seventh Circuit's indefensible opinion will remain on the books. Left uncorrected, the decision below will lend credence to an unprecedented and unjustifiable reading of the Hobbs Act and produce all manner of mischief.

Precisely for this reason, an extraordinary array of governmental, labor union, organizational, and individual protester *amici* have filed briefs urging this Court to address the Hobbs Act question *now*. Eight States have expressed serious concerns about the implications of the Seventh Circuit's "freewheeling

---

[6] Respondents say that these determinations are "factual," presumably because finding facts is "a function the trial court is uniquely able to handle." Opp. 28. In fact, the remaining issues are legal in nature. See *Griffin* v. *United States*, 502 U.S. 46, 53-56, 59 (1991) (discussing effect of legal defects in general verdicts).

three-way construction" of the Hobbs Act "for state and local government officials," who are covered by the statute. See *Amicus* Br. of Alabama *et al.*, at 15 ("States' *Amicus* Br."); *id.* at 1, 4. Similarly, a large and diverse group of political activists and organizations – including two national labor unions, the IBEW and the Teamsters – have joined another *amicus* brief expressing concerns about the threat posed by the decision below, if left uncorrected, to labor and political protesters. *Amicus* Br. of Consistent Life *et al.*, at 10-15, 1a-16a ("Activists' *Amicus* Br."); see also *Amicus* Br. Concerned Women for America, at 1 (organization of 500,000 members). This Court should not ignore the pleas of these *amici* to act now. See States' *Amicus* Br. 18-20; Activists' *Amicus* Br. 4-6, 17.

III. The RICO Injunction Issue Merits Review

As explained in our petition (at 26-30), if the Court declines to reverse summarily, it should again grant review to decide whether private injunctive relief is available under 18 U.S.C. § 1964(c). See also 04-1352 Pet. 13-23.

Respondents do not deny any of what we said in the petition about this issue. Although they suggest (at 14) that proceedings in the trial court might "moot" this issue, it is also quite possible that they will not. After 19 years, and two trips to this Court, petitioners should not be required to endure ... ther proceedings in the trial court when a favorable resolution of the RICO injunction issue would end this case – especially where the Court would have resolved this question in *Scheidler II* if it had thought the case might continue. The issue is important and recurring; it has already been fully briefed in this Court; and its resolution now would provide beneficial guidance to litigants and lower courts across the country. The Seventh Circuit (in the decision below) having denied petitioners' request for en banc rehearing of this issue, it is clear that the conflict in the circuits will persist and will need to be addressed eventually by this Court. This is the right case to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS BREJCHA
DEBORAH FISCHER
CHRISTOPHER M. HENNING
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
1880 S. Redwood Street
Escondido, CA 92025
(760) 737-7181

MAY 2005

ALAN UNTEREINER*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

APPENDICES

Nos. 99-3076, 99-3336,
99-3891, 99-3892, and 01-2050

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Plaintiffs-Appellees,
v.
JOSEPH M. SCHEIDLER, *et al.*,
Defendants-Appellants.

On Remand from the United States Supreme Court and
on Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 7888
The Honorable David H. Coar

PLAINTIFFS-APPELLEES' ANSWER TO PETITIONS FOR REHEARING AND REHEARING *EN BANC*

Fay Clayton
Susan Valentine
Elizabeth J. Hubertz
Robinson Curley
& Clayton, P.C.
300 South Wacker Drive

Lowell E. Sachnoff
Casey Westover
Sachnoff & Weaver, Ltd.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606

Suite 1700 (312) 207-1000
Chicago, Illinois 60606
(312) 663-3100

Counsel for Plaintiffs Appellees
National Organization for Women, et al.

* * * * *

II. THE SUPREME COURT ADDRESSED ONLY EXTORTION AND NOT THE PHYSICAL VIOLENCE PRONG OF § 1951

* * * * *

Further, and in contrast to the Scheidler Defendants' creative readings, the panel's February 26, 2004, Order properly declines to presume that the Supreme Court went beyond its grant of *certiorari*. *Toyota Motor Mfg.*, 534 U.S. at 202 ("'[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court.'"). *See also Glover*, 531 U.S. at 204; *Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001). It would be a wild leap to conclude that, in determining the elements of extortion-based predicate acts under RICO, the Supreme Court somehow implicitly ruled that the non-extortion-based predicate acts based on the physical violence prong of 18 U.S.C. § 1951 were invalid. It is even more of a leap to conclude that the Court made such a ruling *sub silentio*. Such a ruling runs counter to the Court's previous decisions, *Stirone* v. *United States*, 361 U.S. 212, 215 (1960), to the text of § 1951, and to the parties' agreed-upon Jury Verdict Form.[9]

---

[9] The Scheidler Defendants, at 6 n.1, make the contorted argument that because the Supreme Court reviewed New York law on coercion in deciding what extortion means under the Hobbs Act, it somehow inherently decided that when Congress passed the Hobbs Act, it intended that "physical violence" would also be limited by the contours of extortion under New York law. This is sheer fantasy, and nothing in *Scheidler II* or the text of the Hobbs Act remotely supports it. It is more

* * * * *

IV. DEFENDANTS' READING OF § 1951 VIOLATES BASIC PRINCIPLES OF STATUTORY CONSTRUCTION

Despite their numerous waivers of the issue, Defendants nonetheless urge this Court to reach the merits and adopt their construction of the Hobbs Act — one that would limit § 1951 to two crimes, robbery and extortion. Such a reading would require the Court to overlook the statute's "physical violence" language and its own prior construction of the text, and would read statutory language to have different meanings within a single section. Moreover, such a reading ignores the broad remedial purposes Congress intended for this Act.

A. The Plain Text of § 1951 Reveals Three Separate Prongs.

The Hobbs Act criminalizes specific conduct that interferes with interstate commerce. Section 1951 makes it illegal to interfere with interstate commerce in three ways: (1) by robbery; (2) by extortion; or (3) by physical violence. In describing § 1951, the Supreme Court has adopted this plain

---

likely that because Congress included extortion but not coercion in § 1951, it chose to ensure that the Act separately covered physical violence that interfered with interstate commerce, and so included this important third prong. Because the Supreme Court narrowed the scope of extortion in *Scheidler II*, acts or threats of physical violence designed to obtain control over property are no longer extortion, but can be prosecuted under the third prong: for example, a terrorist threat to blow up a bridge over the Mississippi River.

The Scheidler Defendants' further argument, at 11 n.3, that an early version of the predecessor statute to the Hobbs Act, the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979, would have covered physical violence separate from extortion or robbery, reinforces our point. In drafting the Hobbs Act, Congress did *not* adopt the narrower construction, present in both the 1934 Act and an earlier draft of the Hobbs Act. Instead, it enacted broader language and a broader structure, and so covered more criminal activity.

reading: "[Section 1951] manifest[s] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by *extortion, robbery or physical violence*." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).[11] Any other result would render the "physical violence" language meaningless.

Defendants urge this Court to ignore *Stirone*'s description and adopt instead the strained interpretation found in the only other case to consider § 1951's third prong, *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999) (reversing 993 F. Supp. 801 (D. Mont. 1998)). Under *Yankowski*'s reading, the phrase "acts or threats of physical violence" in § 1951(a) — the third prong of the statute — refers only to acts or threats of physical violence that accompany a robbery or an extortion.

One of the Defendants' own Supreme Court *amici*, Professor Craig M. Bradley, explains why the Defendants' and *Yankowski*'s reading of § 1951 "makes no sense." Bradley, *NOW* v. *Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Review 129, 142-(1994).[12] As Professor Bradley

---

[11] Unless otherwise noted, emphasis in quoted material has been supplied.

[12] Although the Scheidler Defendants now attempt to discredit their former *amicus*, they are unable to counter Professor Bradley's facts or reasoning and cannot provide a sensible, non-redundant construction of § 1951(a). Contrary to the Scheidler's assertions, Bradley correctly states that the Hobbs Act was *"first proposed during* World War II," and expressly notes that the war had ended before the Act's passage, *see* fn.78. There is no reason to think Congress ignored the need to protect commerce from acts or threats of physical violence.

Tellingly, the Defendants' selective citation to Bradley's footnote 77 fails to advise this Court of Bradley's conclusion: it is preposterous to argue that the third prong of § 1951 was included by Congress only to cover a "farfetched and unlikely" scenario that is probably already encompassed within the "attempts" or "conspires" language of the Hobbs Act. As Professor Bradley writes, "Surely Congress did not add a special clause to the Hobbs Act to deal with such a remote possibility." If

shows, § 1951 defines the crime of extortion *to include violence:* "the obtaining of property from another ... induced by the wrongful use of actual or threatened force, *violence* or fear." 18 U.S.C. § 1951(b)(2). Likewise, the crime of robbery is also defined to include violence: "the unlawful taking or obtaining of personal property from the person against his will, by means of actual or threatened force or *violence,* or fear of injury to his person or property." 18 U.S.C. § 1951(b)(3). Attempts and conspiracies are also covered, § 1951(a). Thus, the separate offenses of extortion and robbery already encompass acts or threats of physical violence. If the third prong of § 1951 applied to nothing more than violence *in the context of* extortion or robbery, the statutory language involving "physical violence" in § 1951(a) would be entirely redundant.[13]

By contrast, Plaintiffs' interpretation takes account of Congress' use of the word "or" to set off each separate violation: subsection 1951(a) criminalizes interference with interstate commerce by robbery or extortion *or* physical violence. Only this reading gives effect to all the words of the statute, as required by principles of statutory construction. *See Bennett* v. *Spear*, 520 U.S. 154, 173 (1997).

The Defendants' forced reshaping of § 1951's text to fit their desired meaning, *see OR* fn.1, Scheidler at 7, amounts to a redraft of the statute. To achieve their desired ends, the Defendants torture the text beyond all recognition and argue that the textual phrase, "this section," has meanings that are internally inconsistent, a clear violation of an elementary rule of statutory construction. *Mohasco Corp.* v. *Silver,* 447 U.S. 807

Congress had intended the meaning Defendants proffer, the third prong would never have been included.

[13] OR's "subordinate enforcer" argument, *see* footnote 2, ignores the fact that the robbery and extortion prongs of § 1951 themselves criminalize attempts and conspiracies, as Professor Bradley also explains, *id.* at 142-43. OR's strained suggestion that the third prong brings in some "enablers" who are not already covered suffers from the same fatal flaw as the rest of Defendants' argument.

(1980) (courts must not construe the same word to have two different meanings in a single statute). Defendants ask the Court to read the words "this section," as used in § 1951(a), to mean only subsection (a). Yet, they must admit that the same words, "this section," when used in §§ 1951(b) and (c), unquestionably refer to § 1951 as a whole, not just subsection (a), (b) or (c). A reading based on the premise that Congress used the same language to have two inconsistent meanings within a single section of the statute is plainly erroneous. *Mohasco,* 447 U.S. at 825-26.[14]

Defendants' attempt to read the third prong of § 1951 out of the statute violates cardinal principles of statutory construction: that statutes should be read to give meaning to every word in the text, and that a phrase cannot have two different meanings in a single statutory section. Their construction is simply incorrect.

B. Congress Intended That § 1951 Be Broadly Construed.

Not only is Plaintiffs' construction of the third prong of § 1951 the only one that conforms to basic principles of statutory construction, but it is the only one that comports with the broad remedial purpose of the statute. As the Supreme Court made clear in *Stirone,* the broad language of § 1951 shows Congress intended it to invoke all the power Congress had:

> The Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws interference with commerce "in any way or degree."

---

[14] Defendants' asserted fear that the Plaintiffs' reading of § 1951 would mean the statute covered "any interference with commerce" where physical violence was involved is greatly exaggerated. Defendants ignore a key limitation, made clear in subsection (c): the Hobbs Act, by its terms, covers only *interstate* commerce. *See* § 1951(b)(3) (defining "commerce," "as used in this section," as interstate commerce). *See also* Section V below. Defendants' parade of horribles is sheerly imaginary.

361 U.S. at 215. *See also United States* v. *Elders*, 569 F.2d 1020, 1023 (7th Cir. 1978) ("Courts have consistently held that the Act should be given an expansive interpretation. . . .").

There can be no dispute that Congress enacted § 1951 to address a serious problem of violence and threats of violence that harmed the flow of interstate commerce. Consistent with congressional intent and the Supreme Court's interpretation of it, the statute must be broadly construed to give meaning to Congress's decision to criminalize the separate violation of physical violence that interferes with interstate commerce.

Finally, even if Defendants had not waived their arguments so that their textual interpretation could be considered, the trial court should have the first opportunity to consider these issues in light of the evidence it saw and heard at trial. If the district court were to decide that the physical violence acts were not sufficient, standing alone, to support the nationwide injunction, the proper interpretation of § 1951 would be immaterial. February 26, 2004, Order at 3-4.

* * * * *

Respectfully submitted,

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.

Dated: April 1, 2004.

* * * * *

4543 Header, Line 1

[line numbering omitted]

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,	)	
Plaintiff	)	No. 86 C 7888
vs.	)	April 13, 1998
	)	8:15 a.m.
	)	Chicago, Illinois
	)	Trial
JOSEPH M. SCHEIDLER, et al.,	)	
Defendants.	)	

VOLUME 24
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID H. COAR

* * * *

[Tr. 4575]

THE COURT: Now, on 4 we also addressed all of this last week, and I thought that like everything else nothing ever comes

to rest in this case, 4 was going to be given as we left it last week. I don't understand what these proposed changes are, Mr. Crain.

MR. CRAIN: Your Honor, quite simply it's just that if you look at 4, E is included in A. I mean, you're giving the opportunity for the chance for the jury to give the plaintiffs two bites at the apple over the same act. There [Tr. 4576] could be an act of threat or physical violence that would still be an act of extortion. It's included in A. That's the first problem. And then I guess the other problem having to do with the Travel Act in F doesn't put the language of the Act at all. It leaves out a critical word in the statute.

* * * *

[Tr. 4577]

THE COURT: All right. What about Mr. Crain's point on E in 4?

MS. CLAYTON: Oh, he's wrong, Your Honor. There two different elements, two different parts of the Hobbs Act. A person could actually violate both by doing the same act, but they're a little bit different. E is almost verbatim out of the second – I think it's the second part. Threats or acts of extortion, of course, could include physical violence. But violence to property is something quite different, and that's a separate violation under the Hobbs Act. I thought we had agreed on that a long time ago. I'm sort of puzzled that he's raising that now. I could show Your Honor the cite if you want, but it's right there I think [Tr. 4578] in 1951 or whatever it is.

MR. CRAIN: All we're saying is that E is a subset of A, Your Honor. It's still the same violation as extortion. However you want to say it, it's still coming out of same statute.

MS. CLAYTON: It's coming out of the same statute but a different section, just as Sections C and D of RICO are two different sections. You might violate them by doing the very same act. Let me see if I can find it here.

MR. CRAIN: Your Honor, one can be guilty of conspiracy, but this is – this doesn't say that.

MS. CLAYTON: Section A of the Hobbs Act says whoever in any way obstructs or affects commerce, et cetera, by extortion, and then the second part says or attempts or conspires to do so. And then the third part is or commits or threatens physical violence to any person or property. Those are three separate violations under Section 1951-A.

MR. CRAIN: It's still extortion, Your Honor.

MS. CLAYTON: I don't believe it could be.

MR. CRAIN: A, B, or C it's still extortion.

MS. CLAYTON: I don't believe that could be right. Otherwise I can't imagine why Congress would have put extortion in the first one, attempt or conspire to do so in the next one, and have a whole different set of phraseology in the third one.

[Tr. 4579]

THE COURT: I'm going to leave it as is. Now, with respect to – the only changes, therefore, in 4, F adds with intent before to commit. G, the reference – the parenthetical reference is to H, and similarly in H the parenthetical reference is to F. Anything else?

* * * * *

(5) (4)

Nos. 04-1244, 04-1352

Supreme Court, U.S.
FILED
MAY 11 2005
OFFICE OF THE CLERK

In the

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

OPERATION RESCUE,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF ALABAMA, DELAWARE, KANSAS, MICHIGAN, OHIO, SOUTH DAKOTA, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7401

May 11, 2005

(Additional counsel for amici curiae are listed inside the front cover.)

ADDITIONAL COUNSEL

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
820 N. French Street
Wilmington, DE 19801

PHILL KLINE
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. 10th Avenue
Topeka, KS 66612-1597

MICHAEL A. COX
ATTORNEY GENERAL
STATE OF MICHIGAN
P.O. Box 30212
Lansing, MI 48909

JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO
State Office Tower
30 E. Broad St.
Columbus, OH 43215-3428

LAWRENCE E. LONG
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
500 East Capitol Avenue
Pierre, SD 57501-5070

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
Capitol Station
P.O. Box 12548
Austin, TX 78711-2548

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
Utah State Office Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-2320

QUESTIONS PRESENTED

1. Whether the Seventh Circuit, on remand, disregarded this Court's mandate by holding that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the "injunction issued by the District Court" might *not* need to be vacated.

2. Whether the Seventh Circuit correctly held, in conflict with decisions of the Sixth and Ninth Circuits, that the Hobbs Act, 18 U.S.C. § 1951(a), can be read to punish acts or threats of physical violence against "any person or property" in a manner that "in any way or degree * * * affects commerce," even if such acts or threats of violence are wholly unconnected to either extortion or robbery.

3. Whether this Court should again grant certiorari to resolve the deep and important intercircuit conflict over whether injunctive relief is available in a private civil action for treble damages under RICO, 18 U.S.C. § 1964(c).*

---

* These questions are taken verbatim from the petition in *Scheidler v. National Organization for Women, Inc.*, No. 04-1244.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 3

I. This Court Should Clarify Confusion Over Whether the Hobbs Act Reaches Freestanding Acts or Threats of Physical Violence, Unconnected to Either Robbery or Extortion. 4

A. The Circuits Are Divided Over Whether the Hobbs Act Reaches Freestanding Acts or Threats of Physical Violence 4

B. The Seventh Circuit's "Three-Way" Interpretation of the Hobbs Act Is Untenable 6

1. The "Three-Way" Interpretation Cannot Be Reconciled With the Hobbs Act's Text 6

2. The "Three-Way" Interpretation Cannot Be Reconciled With the Hobbs Act's Legislative History. 8

3. The "Three-Way" Interpretation Cannot Be Reconciled With the Structure of the Federal Criminal Code 10

4. The "Three-Way" Interpretation Cannot Be Reconciled With Fundamental Principles of Federalism. 13

II. This Court Should Consider and Resolve the Hobbs Act Question Now. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 14

Brecht v. Abrahamson, 507 U.S. 619 (1993) 14

Chickasaw Nation v. United States, 534 U.S. 84 (2001) 10

Clark v. Martinez, 125 S. Ct. 716 (2005) 18

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 14

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 18

Engle v. Isaac, 456 U.S. 107 (1982) 14

Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) 14

National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 3

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 17

Raygor v. Regents of Univ. of Minnesota, 534 U.S. 533 (2002) 14

Scheidler v. National Org. for Women, Inc., 537 U.S. 393 (2003) ..... passim

Stirone v. United States, 361 U.S. 212 (1960) 18

United States v. Bass, 404 U.S. 336 (1971) 14

United States v. Culbert, 435 U.S. 371 (1978) 8

United States v. Franks, 511 F.2d 25 (6th Cir. 1975) 5

United States v. Kallestad, 236 F.3d 225 (5th Cir. 2000) 17

United States v. Lopez, 514 U.S. 549 (1995) 1, 14, 16, 17

United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004) 17

United States v. Morrison, 529 U.S. 598 (2000) 14, 16, 17

United States v. Rodia, 194 F.3d 465 (3d Cir. 1999) 17

United States v. Ryder, 110 U.S. 729 (1884) 10

United States v. Yankowski, 184 F.3d 1071 (9th Cir. 1999) 5, 9

West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991) 12

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 14

Statutes

The Hobbs Act, 18 U.S.C. §1951 ..... passim

Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 *et seq*..... passim

Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979 9

18 U.S.C. §32(a)-(b) 11

18 U.S.C. §33(a) 11

18 U.S.C. §111(a) 11

18 U.S.C. §248 11

18 U.S.C. §351 12

18 U.S.C. §844(i) 11

18 U.S.C. §1201(a) 11, 12

18 U.S.C. §1203(a) 11

18 U.S.C. §2119 11

18 U.S.C. §2242 11

18 U.S.C. §2261(a) 11

Other Authorities

S. 1861, 91st Cong. §2(a) (1969) 12

Oxford English Dictionary (2d ed. 1989) 10

Random House Webster's College Dictionary (2d ed. 1997) 10

J. Sutherland, *Statutory Construction* (3d ed. 1943) 12

Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129 (1994) 5

Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691 (1999) 13

INTEREST OF AMICI

Traditionally, courts have read the federal Hobbs Act to permit criminal prosecution (or civil liability) only in cases involving either robbery or extortion. In the decision below, the Seventh Circuit broke ranks and held that, in addition to those two discrete crimes, the Hobbs Act can be construed to punish *any* act or threat of physical violence to *any* person or property that in *any* way affects interstate commerce. The States' interests in this case are two-fold. First, the States have a compelling interest in resisting the federalization of the criminal law, an area "where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 564 (1995). Second, the States have a keen interest in ensuring that their officers and employees, who necessarily engage in acts and threats of physical violence to persons (as in day-to-day police work) and property (as when condemning blighted buildings) are protected against over-expansive constructions of the Hobbs Act and its fellow traveler, RICO.

STATEMENT

It's worse than we thought.

In briefing this case several years ago, the State of Alabama argued that, by essentially ignoring the requirement that property be "obtain[ed]" to trigger Hobbs Act liability for extortion, the Seventh Circuit had expanded the Hobbs Act's (and, by extension, RICO's) scope in a way that was "truly breathtaking – and troubling." Br. for the State of Alabama as Amicus Curiae at 10, *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393 (2003) (Nos. 01-1118, 01-1119) (cert. stage). By an 8-1 margin, this Court agreed and held that it is not enough for Hobbs Act purposes that an individual be induced "'to give up' property rights"; rather, a party liable for extortion under that Act must not only deprive his victim of her property but also acquire – in the words of the statute, "obtain[]" – that property for himself. *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 400-09 (2003). Any other reading, this Court said, would constitute

an "unwarranted expansion" of the Hobbs Act's definition of extortion. *Id.* at 402.

Now, on remand from this Court's reversal, the Seventh Circuit has opened up another, more problematic can of worms. The court of appeals has now suggested (contrary to existing understanding) that robbery and extortion are *not* the only two offenses that can give rise to Hobbs Act liability. There is, the Seventh Circuit says, a third "way." Pet. App. 8a.[1] Specifically, that court has held that it may well be enough for a Hobbs Act prosecutor (or plaintiff) to show – without reference to any robbery or extortion – that another person has "commit[ted] or threaten[ed] physical violence to any person or property" in a way that somehow "obstruct[s], delay[s], or affect[s] commerce." Pet. App. 26a-29a (panel); Pet. App. 6a-15a (rehearing). Thus, the Seventh Circuit left open to the district court the question whether four claimed "acts or threats of physical violence" – acts freestanding in the sense that they bear no relation to any alleged robbery or extortion – could alone support Hobbs Act (and RICO) liability. *See* Pet. App. 27a-28a.

The Seventh Circuit's construction of the Hobbs Act this go around is even more "breathtaking" and "troubling" than before. Last time, at least, the court of appeals' expansion of the Hobbs Act was limited to the term "extortion"; a deprivation of property, that court said – even without an accompanying acquisition – was sufficient to constitute Hobbs Act extortion. (Again, we disagreed, as did this Court.) This time, it seems to us, the stakes are much higher. This time, the Seventh Circuit is not just tweaking or massaging an *existing* basis for Hobbs Act liability – "extortion" means this, or "robbery" means that. This time, the Seventh Circuit has opened up an *entirely new* avenue – a third "way" – to Hobbs Act liability. The Seventh Circuit's decision here leaves open the possibility that neither

[1] All "Pet. App." references are to the appendix submitted with the petition in *Scheidler v. National Organization for Women*, Inc., No. 04-1244.

extortion nor robbery is a necessary ingredient of a Hobbs Act violation, at all – that it is enough for a person simply to commit or threaten violence (either to another person or to property) in any way that affects interstate commerce.

That startling conclusion, we respectfully submit, warrants this Court's immediate attention.

REASONS FOR GRANTING THE PETITION

Before getting into the guts of the Hobbs Act issue, it is worth noting briefly that there is a good argument to be made that this Court's decision in *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393 (2003) – which, for ease of analysis, we will call *Scheidler II*[2] – has already resolved that issue, and that, in fact, by keeping this case alive the Seventh Circuit has contravened this Court's mandate. Concluding its opinion in *Scheidler II*, this Court held that

> Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated. We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. §1964.

537 U.S. at 411.

On its face, that statement of the Court's holding is hard to quibble with – it is, it seems to us, an unambiguous directive to the Seventh Circuit to (1) reverse the judgment against petitioners, (2) vacate the injunction, and (3) close the case. While we leave the details of this argument to the petitions themselves (*Scheidler* Pet. at 12-17; *Operation Rescue* Pet. at 8-13), we will say briefly before moving on that it would certainly appear that "the Seventh Circuit has now

[2] *"Scheidler I"* being *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

decided" – in the teeth of this Court's own decision – "that 'all' of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the 'judgment that petitioners violated RICO' was *not* necessarily reversed, and that the injunction might *not* need to be vacated after all." *Scheidler* Pet. at 12 (emphasis in original).

If it is determined, as petitioners have argued, that the Seventh Circuit has ignored the holding of *Scheidler II*, this Court should summarily reverse.

I. This Court Should Clarify Confusion Over Whether the Hobbs Act Reaches Freestanding Acts or Threats of Physical Violence, Unconnected to Either Robbery or Extortion.

What troubles amici most about the Seventh Circuit's decision is not its seeming disregard for this Court's mandate; that is an issue primarily for the parties here. Our concern, instead, is with the Seventh Circuit's unprecedented construction of the Hobbs Act itself – and the implications of that construction for States and state officers.

A. The Circuits Are Divided Over Whether the Hobbs Act Reaches Freestanding Acts or Threats of Physical Violence.

In relevant part, the Hobbs Act provides as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. §1951(a).

The Seventh Circuit posited "two possible interpretations of this language." Pet. App. 8a. "'First it may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or

extortion." *Id.* (quoting Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129, 142-43 (1994)). Alternatively, the court of appeals said, it might instead "'forbid[] threatening or committing physical violence in furtherance of a plan to "obstruct, delay, or affect commerce" (other than through robbery or extortion).'" *Id.* (quoting Bradley, *supra*, at 143). In other words, the Seventh Circuit summarized, the Hobbs Act lends itself to both a "two-way" interpretation – the two prohibited acts being robbery and extortion – and a "three-way" interpretation – under which, in addition to robbery and extortion, "physical violence" alone can support a Hobbs Act claim. *See id.*

The Sixth and Ninth Circuits have definitively rejected the so-called three-way reading. The Sixth Circuit, for its part, said that it could not "accept the government's view that the statute proscribes all physical violence obstructing, delaying, or affecting commerce"; rather, that court held, §1951(a)'s "language and legislative history require that the violence be in furtherance of a plan or purpose to obstruct, delay, or affect commerce *by extortion or robbery*." *United States v. Franks*, 511 F.2d 25, 31 (6th Cir. 1975) (emphasis added). The Ninth Circuit was even less charitable: It described as "untenable" and "fatally flawed" the Government's view that "the Hobbs Act criminalizes any act of violence to person or property that has an effect on commerce, even if the alleged violent act had no connection to any executed or planned robbery or extortion." *United States v. Yankowski*, 184 F.3d 1071, 1072, 1073 (9th Cir. 1999).

Now, in stark contrast to the Sixth and Ninth Circuits' decisions, the Seventh Circuit has expressly held open the three-way interpretation as a viable reading of the Hobbs Act. Indeed, although the Seventh Circuit panelists repeatedly protested that they did not mean to prejudge the Hobbs Act issue, *see, e.g.*, Pet. App. 6a, 15a, their opinion does just that. As the *Scheidler* petition accurately observes, the Seventh Circuit's order on rehearing "devoted ten full pages to addressing – and criticizing – many of the arguments made in the rehearing petition for why the

Hobbs Act cannot and should not be read to punish freestanding act or threats of violence." *Scheidler* Pet. at 8. And as we will explain in some detail below (*see infra* at 18-20), the Seventh Circuit has left little doubt as to its view that a free-floating allegation of physical violence *can* give rise to Hobbs Act liability.

In implicitly endorsing the three-way reading of the Hobbs Act, the Seventh Circuit has created a circuit split and sown confusion about the Act's proper construction. This Court should step in to set matters straight.

B. The Seventh Circuit's "Three-Way" Interpretation of the Hobbs Act Is Untenable.

Amici respectfully submit that the Seventh Circuit is simply wrong in its assessment of the so-called three-way interpretation of the Hobbs Act. That Act's text, legislative history, and statutory structure, along with fundamental principles of federalism, combine to condemn the freewheeling three-way reading that the Seventh Circuit's decision so struggles to preserve.

1. The "Three-Way" Interpretation Cannot Be Reconciled With the Hobbs Act's Text.

First, there is the Hobbs Act's plain language. Because a careful textual analysis is in order here, we set out that language again:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. §1951(a).

The Seventh Circuit believed that "[g]rammatically, the text can be read either way" – that is, to support either the

two-way or the three-way interpretation – "without undue strain." Pet. App. 8a. We disagree. As a matter of grammar, the three-way interpretation of §1951(a) seems to us quite "strain[ed]." Reading the Act to make physical violence a stand-alone violation is worse than awkward: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce ... commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section ...." The transition between the preambular clause about "commerce" and the phrase "commits or threatens physical violence" just doesn't work. And, it should be noted, the difficulty cannot be alleviated by keeping the word "or" with the phrase "commits or threatens physical violence." While that might solve grammatical problems (allowing for a workable transition), it would have the effect, as well, of making the act of "obstruct[ing], delay[ing], or affect[ing] commerce" *itself* a stand-alone Hobbs Act offense – an interpretation that, to our knowledge, no one has endorsed.

The Seventh Circuit's three-way reading suffers from an additional textual flaw. The Hobbs Act's physical-violence clause applies only to one who "commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section.*" 18 U.S.C. §1951(a) (emphasis added). The italicized language seems quite clearly to refer back to something that has come before – something that constitutes the relevant "violation of this section." If, as the Seventh Circuit's opinion suggests, an act or threat of physical violence may *itself* constitute the relevant "violation of this section," then the physical-violence clause would be read to apply to anyone who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose to *commit or threaten physical violence to any person or property.*" That circular formulation, of course, doesn't make any sense.

Far and away the best reading of the Hobbs Act goes like this: At its core, the Act applies to any person who "in any

way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, *by robbery or extortion*." 18 U.S.C. §1951(a) (emphasis added). The two clauses that follow both refer back to that core prohibition. First, the Act targets anyone who "attempts or conspires *so to do*" – that is, attempts or conspires to obstruct, delay, or affect commerce by robbery or extortion. *Id.* (emphasis added). Second, and more immediately relevant here, the Act reaches anyone who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of this section*" – that is, commits or threatens violence in furtherance of a plan to obstruct, delay, or affect commerce by robbery or extortion. *Id.* (emphasis added). Under this sensible and straightforward reading, §1951(a) entails (1) a core prohibition on robbery and extortion and (2) complementary prohibitions on (a) attempts and conspiracies to rob or extort and (b) acts or threats of violence associated with robberies and extortion.

2. The "Three-Way" Interpretation Cannot Be Reconciled With the Hobbs Act's Legislative History.

The Hobbs Act's legislative history leads to precisely the same conclusion. Indeed, two separate pieces of legislative history expose the error of the three-way interpretation. First, there is the Anti-Racketeering Act of 1934, which this Court has called the "predecessor to the Hobbs Act." *United States v. Culbert*, 435 U.S. 371, 375 n.5 (1978). The Anti-Racketeering Act, as summarized by the Ninth Circuit in *Yankowski* (and as acknowledged by the Seventh Circuit here, *see* Pet. App. 11a-12a), provided that "[a]ny person who, in connection with or in any degree affecting trade or commerce (a) commits or attempts extortion of money, or (b) obtains property through extortion, or (c) *'commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b),'* or (d) conspires with respect to (a),

(b) or (c) ... shall be imprisoned or fined." 184 F.3d at 1073 n.5 (quoting Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979) (emphasis added). That, at least as far as extortion is concerned, is very nearly exactly the prohibition expressed by the plain language of the present-day Hobbs Act: Physical violence is not itself the object of the statute – extortion is – but only one means of accomplishing that object. The Seventh Circuit, conspicuously, had nothing to say about either the Anti-Racketeering Act or what it might spell for the three-way interpretation.

Second, there is the language of the Hobbs Act as originally enacted in 1946. The "fit" between the original Act (which we quote at length below) and the plain-language reading of the current version is remarkable:

> Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

Pub. L. No. 486, 60 Stat. 420 (1946). The conclusion is unmistakable: The core prohibition (in the 1946 Act, Section 2) targets "robbery [and] extortion"; the complementary prohibitions against conspiracies (Section 3), attempts (Section 4), and physical violence (Section 5) do not stand alone but, rather, all refer back to the core prohibition. All of which, we submit, dovetails precisely with the best reading of the Hobbs Act as currently structured.

The Seventh Circuit acknowledged that, as enacted in 1946, the Hobbs Act "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." Pet. App. 15a. But, the court said, it was not until 1948 that the Act "assumed its present form." *Id.* And while conceding that the 1948 revisions "were intended to be formal, stylistic changes," the Seventh Circuit supposed that it was "not beyond the realm of possibility that the revisers may have made certain substantive changes either advertently or inadvertently." *Id.* There are three fundamental problems with the court of appeals' reasoning in this respect, which we will mention briefly. First, if, as the Seventh Circuit admits, the 1948 changes were "intended" to be only formal and stylistic, then, by definition, any substantive changes could not have been "advertent," but must have been accidental, instead. *See, e.g., 7 Oxford English Dictionary* 770 (2d ed. 1989) (defining "inadvertent" to mean "unintentional"); *Random House Webster's College Dictionary* 658 (2d ed. 1997) (same). Second, whatever one's particular theory of statutory interpretation, the aim, all presumably agree, is to discern and enforce Congress' intent. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). If, as the Seventh Circuit acknowledges, Congress had no "inten[tion]" in 1948 to make substantive changes to the Hobbs Act, then none should be attributed. And, finally, as the *Scheidler* petition emphasizes, "this Court has long recognized the principle that it 'will *not* be inferred that the legislature, in revising and consolidating the laws'" – as it did with the Hobbs Act in 1948 – "'intended to change their policy, unless such intention *be clearly expressed*,'" which all acknowledge it was not here. *Scheidler* Pet. at 22 (quoting *United States v. Ryder*, 110 U.S. 729, 740 (1884)).

3. The "Three-Way" Interpretation Cannot Be Reconciled With the Structure of the Federal Criminal Code.

In addition to textual and historical problems, there are also at least two structural defects inherent in the three-way

reading. First, an interpretation of the Hobbs Act that makes any act or threat of "physical violence" – standing alone – a federal offense has the effect of rendering essentially superfluous a whole host of other, more specific, federal criminal statutes. Perhaps the clearest example is the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. §248, which, as Justice Stevens observed in *Scheidler II*, responds directly "to the concerns that gave rise to these cases." 537 U.S. at 417 (Stevens, J., dissenting). Specifically, as relevant here, the so-called FACE Act targets anyone who "intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services." 18 U.S.C. §248(a)(3). Notably, though, the FACE Act prescribes relatively modest criminal penalties for violations: one year for a first offense and three years for subsequent offenses. *Id.* §248(b). By bluntly punishing essentially all "physical violence" (whether against persons or property) with 20 years in prison, the three-way interpretation of the Hobbs Act supplants the congressional compromise that the FACE Act presumably embodies.

And the FACE Act is only the most obvious casualty of the Seventh Circuit's overbroad reading. A host of federal criminal statutes would be effectively swallowed up by the three-way interpretation. Among them –

- 18 U.S.C. §32(a)-(b) (destruction of airplane);
- 18 U.S.C. §33(a) (destruction of motor vehicle);
- 18 U.S.C. §111(a) (assaulting a federal officer);
- 18 U.S.C. §844(i) (arson);
- 18 U.S.C. §1201(a) (kidnapping);
- 18 U.S.C. §1203(a) (hostage-taking);
- 18 U.S.C. §2119 (carjacking);
- 18 U.S.C. §2242 (sexual abuse); and
- 18 U.S.C. §2261(a) (domestic violence).

Some overlap among federal statutes is to be expected, of course. *Compare* 18 U.S.C. §1201(a) (kidnapping) *with* 18 U.S.C. §351 (kidnapping federal officer). But by broadly criminalizing "physical violence," the three-way reading of the Hobbs Act would consign a large chunk of the federal criminal code to the dustbin. This Court should reject a statutory construction that seems so obviously to "make nonsense out of the *corpus juris*." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100-01 (1991) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." (quoting 2 J. Sutherland, *Statutory Construction* §5201 (3d ed. 1943)).

There is a second structural problem worth noting. The three-way interpretation would have the effect of expanding RICO's scope beyond all recognizable – and intended – boundaries. RICO, of course, includes violations of the Hobbs Act among its list of predicate crimes. 18 U.S.C. §1961(1). By contrast, RICO conspicuously does *not* include as a predicate crime any of the physical-violence-based offenses listed above. Thus, for whatever reason, Congress chose not to make arson, for instance, a RICO predicate offense. But under the three-way reading, a prosecutor or plaintiff could paper over that evident gap simply by dressing up an arson charge in Hobbs Act garb. No statute – and particularly not RICO – should be construed to be so manipulable.

One final RICO-related point: In its original incarnation, the bill that would become RICO defined "racketeering activity" sweepingly to cover "any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year." S. 1861, 91st Cong. §2(a) (1969). After the ACLU and Justice Department (among others) objected to the statute's breadth, the original "danger of violence to life, limb or property" formulation was scrapped in favor of the current delineation of specific offenses. *See* Brian J. Murray,

Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691, 697-99 (1999). By recognizing any act or threat of "physical violence" as a stand-alone Hobbs Act violation qualifying for predicate-act status, the three-way interpretation effectively reinstates the overbroad version of RICO that Congress expressly rejected.

4. The "Three-Way" Interpretation Cannot Be Reconciled With Fundamental Principles of Federalism.

Finally, in addition to text, legislative history, and statutory structure, there is the issue of federalism. The Seventh Circuit's sweeping reading of the Hobbs Act contravenes the most basic tenets of Our Federalism. The court of appeals flagged the federalism issue, but dismissed it casually by pointing to the presence in the Hobbs Act of "a jurisdictional element that limits its application to anyone who 'obstructs, delays, or affects commerce or the movement of any article or commodity in commerce.'" Pet. App. 12a (quoting 18 U.S.C. §1951(a)). That jurisdictional hook, the Seventh Circuit said, alleviated any difficulty with the three-way interpretation "under the Supreme Court's Commerce Clause jurisprudence." *Id.*

There are two problems. First, by focusing exclusively on the Commerce Clause question (of which more below, *see infra* at 16-18), the Seventh Circuit overlooked a more immediate problem: Whether or not it is actually unconstitutional, the three-way interpretation of the Hobbs Act has the untoward effect of *federalizing essentially all violent crime*. Under that reading, anyone who "commits or threatens" any physical violence to "any person or property," and in so doing "in any way or degree" so much as "affects" commerce, is guilty of a federal offense punishable by 20 years. That construction runs headlong into this Court's precedent, as well as common sense.

This Court has recently reiterated that "[u]nder our federal system, the '"States possess primary authority for

defining and enforcing the criminal law,"'" *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982))), and, further, that "criminal law enforcement" is an area "where States historically have been sovereign," *id.* at 564; *see also id.* at 580 (Kennedy, J., concurring) (criminal law an "area of traditional state concern"). It has long been recognized, by contrast, that Congress has no power to "punish felonies generally," *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821), and does not enjoy anything approaching a general police power over citizens' health and safety, *see United States v. Morrison*, 529 U.S. 598, 618-19 & n.8 (2000).

Relatedly, and more recently still, this Court has reiterated that "[w]hen 'Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."'" *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543 (2002) (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))). This clear-statement rule applies, the Court has explained, "when Congress 'intends to pre-empt the historic powers of the States' or when it legislates in '"traditionally sensitive areas'" that '"affec[t] the federal balance."'" *Id.* at 543-44 (quoting *Will*, 491 U.S. at 65 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))). "In such cases, the clear statement principle reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" *Id.* at 544 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461, 464 (1991)).

In view of the presumption that the criminal law is the States' domain, there is "good reason" here – as in *Atascadero*, *Will*, *Gregory*, and *Raygor* – "to rely on a clear statement principle of statutory construction." *Id.* at 543. And whatever might be said (elsewhere) in its favor, the three-way interpretation of the Hobbs Act is *not* "clear" on

the face of the statute. Indeed, the Seventh Circuit itself admitted as much by observing that there are (in its view) "two possible interpretations of [the Hobbs Act's] language" and that §1951(a)'s text "can be read either way without undue strain." Pet. App. 8a. We, of course, happen to believe that the only permissible reading of the Hobbs Act forecloses the three-way interpretation. *See supra* at 6-8. But to the extent that any ambiguity exists, this Court's cases require that it be resolved against federalization and in favor of the traditional federal-state balance.

It is worth pausing briefly to consider the real-world implications of the three-way interpretation. Untethered from the traditional anchors of robbery and extortion, Hobbs Act liability would know no end. Couldn't almost any act or threat of physical violence – whether against a person or property – be said to "affect" commerce in some way, shape, form, or fashion? Assaulting a salesman, certainly; slashing another person's tires, probably. Shoplifters, pickpockets, and other petty thieves – all would presumably be guilty of *federal* offenses (indeed, felonies) under the three-way reading. How the federal courts could be expected to handle the ensuing crush of litigation is anyone's guess.

Nor, somewhat closer to home, is there anything to suggest an exemption to the freewheeling three-way construction for state and local government officials. Construed as the Seventh Circuit seemingly would allow, the Hobbs Act would sweep in a whole host of otherwise legitimate (and purely local) activities undertaken by States and state officers. Police officers, for instance, regularly and necessarily engage in acts or threats of physical violence; do all such acts that somehow "affect" commerce thereby give rise to federal Hobbs Act liability? Likewise, cities and States routinely condemn property and raze buildings, and thereby "commit ... physical violence" against "property"; those acts, too, all Hobbs Act violations? Jurisprudential concerns aside, the practical consequences of the Seventh Circuit's three-way interpretation are enough to condemn it.

There is a second, separate problem with the Seventh Circuit's treatment of the federalism issue. Despite the court of appeals' offhand dismissal, the three-way interpretation of the Hobbs Act does, in fact, present serious Commerce Clause questions. If, as under the traditional two-way interpretation, an act or threat of physical violence must be tied to a robbery or extortion, the Hobbs Act is presumably a valid exercise of Congress' Commerce Clause power – the reason being that robbery and extortion are both "economic" activities within the meaning of this Court's decisions in *Lopez* and *Morrison*. As emphasized in *Morrison*, in every case in which this Court has "sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." 529 U.S. at 611 (citing *Lopez*, 514 U.S. 559-60). As applied to robbery and extortion – both of which, by definition, involve the taking of valuable private property – there is every reason to believe that the Hobbs Act is constitutional.

But that same presumption would not apply were the Hobbs Act read to apply to any act or threat of physical violence – even those *not* tied in any way to robbery, extortion, or any other "economic endeavor." Just as neither gun possession, *see Lopez*, 514 U.S. at 567, nor domestic battery, *see Morrison*, 529 U.S. at 613, is in any sense an economic activity, an act or threat of "physical violence to any person or property," 18 U.S.C. §1951(a), is not in and of itself economic. Under the three-way interpretation, therefore, the Hobbs Act would likely fall victim to the principle that undergirds both *Lopez* and *Morrison* – that the Court has "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617.

The Seventh Circuit's assumption that all Commerce Clause problems melt away by virtue of "a jurisdictional element that limits [the Hobbs Act's] application to anyone who 'obstructs, delays, or affects commerce or the

movement of any article or commodity in commerce'" (Pet. App. 12a) rests on an oversimplification. To be sure, a jurisdictional hook is relevant to determining a statute's constitutionality under the Commerce Clause, but it is not alone conclusive. At most, this Court has said that a jurisdictional element "*may* establish," or "lend support to the argument," that a statute is within Congress' Commerce Clause power. *Morrison*, 529 U.S. at 612-13 (emphasis added). But to serve the proper narrowing function, a jurisdictional hook must actually "ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce." *Lopez*, 514 U.S. at 561. And not every jurisdictional element will fit that bill. *See, e.g., United States v. Maxwell*, 386 F.3d 1042, 1062 (11th Cir. 2004) ("Congress cannot guarantee the proper use of its authority by creating jurisdictional hooks that relate to interstate commerce in some way but fail in all cases to confine the scope of its regulation to Constitutional boundaries."); *United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000) (same); *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999) (same). In the end, whether a statute includes a formal jurisdictional element or not, the test remains whether, as a substantive matter, Congress has observed "the distinction between what is national and what is local." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). As one court put the matter, if "uttering pretextual incantations evoking the phantasm of commerce" alone were sufficient, "Congress could federalize the crime of murder by inserting a statutory element that requires the prosecution to prove that the defendant ate a cheeseburger that traveled in interstate commerce." *Maxwell*, 386 F.3d at 1062.

To be sure, the Seventh Circuit's three-way reading of the Hobbs Act may not correlate precisely to the hypothetical "murder-with-cheeseburger" law. But the basic point remains: The three-way interpretation effectively federalizes all violent crime, and the rote insertion of a boilerplate "in any way ... affects commerce" clause does nothing to justify Congress' intrusion into an

area of traditional state concern. At the very least, under the principle that statutes should be construed to avoid constitutional problems, the Hobbs Act should be read, as the Sixth and Ninth Circuits have read it, to require a connection between an alleged act or threat of violence and an (economic) act of robbery or extortion. *See, e.g., Clark v. Martinez*, 125 S. Ct. 716, 724-25 (2005) (describing avoidance canon); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Far from avoiding constitutional doubt, the Seventh Circuit's decision actually invites it.

II. This Court Should Consider and Resolve the Hobbs Act Question Now.

Even given the circuit conflict and (we say) the obvious flaws in the so-called three-way interpretation, there is, we admit, a separate question whether this Court should grant certiorari now. The Seventh Circuit claimed, after all, not to be resolving the proper construction of the Hobbs Act. *See* Pet. App. 6a (panel opinion "left open the issue"); *id.* at 15a ("[W]e have not, at this point, ruled either implicitly or explicitly on the Hobbs Act issue ...."). Upon examination, however, that claim doesn't hold up. Whether purposefully or not, the Seventh Circuit's decision unmistakably endorses the three-way reading and, in so doing, commends that reading to other courts. As the *Scheidler* petition summarizes, the court of appeals "devoted ten full pages to addressing – and criticizing – many of the arguments made in the rehearing petition for why the Hobbs Act cannot and should not be read to punish freestanding acts or threats of violence." *Scheidler* Pet. at 8. Among other hints, the Seventh Circuit's opinion –

- rejects any suggestion that this Court foreclosed the three-way interpretation in *Scheidler II* (Pet. App. 9a-11a);
- cites to a fragment from *Stirone v. United States*, 361 U.S. 212 (1960), that, it says, "suggests that th[is] Court saw three distinct types of predicate acts in the statute" (Pet. App. 9a);
- essentially mocks, as "greatly overstat[ing] the case," "the doomsday scenario [petitioners] foresee if the Act is read to permit three independent predicate acts" (Pet. App. 12a);
- highlights what it views as the "difficulty [petitioners] face" in making out a plain-language argument (Pet. App. 14a);
- faults petitioners' reading as "leav[ing] an entire clause in the statute that has no meaningful function to perform" (Pet. App. 15a); and
- as noted above, finds it "not beyond the realm of possibility that the revisers [of the Hobbs Act in 1948] may have made certain substantive changes, either advertently or inadvertently," that embrace the three-way interpretation (Pet. App. 15a).

Having shown its cards, the Seventh Circuit purported to reserve judgment, saying that it would be "imprudent to resolve this problem of statutory interpretation at this stage of the litigation of this particular case." Pet. App. 15a. "Rather," the court of appeals said, "than launch such an ambitious project at the tail end of litigation that has been running for almost twenty years, we prefer a wait-and-see approach." *Id.* Accordingly, the court remanded the Hobbs Act issue to the district court for a determination "in the first instance." Pet. App. 28a.

With respect, the Seventh Circuit's reasoning has matters precisely backwards. *It is for the very reason* that this litigation "has been running for almost twenty years" that the question of the Hobbs Act's proper interpretation should be resolved *now*, and not kicked back down the judicial ladder for further percolation. This litigation has dragged on long enough. It would appear for all the world that this Court thought it had wrapped this case up in *Scheidler II* – only to have the Seventh Circuit unwrap it all over again.

See supra at 3-4. If there is anything that remains to be done here, this Court should go ahead and do it.

On the flip side, there is no good reason to "wait-and-see," as the Seventh Circuit suggests. First, while it is of course true that if any factual issues remained it might make sense to allow the district court to tackle them "in the first instance" (Pet. App. 28a), there are none. All that remains, as the Seventh Circuit itself admitted, is a "problem of statutory interpretation" (Pet. App. 15a) – a pure question of law with respect to which the district court has no particular advantage relative to appellate courts. Second, even granting that the Hobbs Act issue is, as the Seventh Circuit believed, "a complex one that deserves ... full briefing and full participation by all parties" (Pet. App. 16a), there will be plenty of time and space in this Court for interested parties to make their views known. Finally, to the extent the Seventh Circuit thought it important to have "input from the United States" concerning the Hobbs Act's reach, *Id.*, we have little doubt that the Solicitor General would exercise his prerogative to participate in this case as an amicus curiae (as he did, for instance, in *Scheidler II*).

The *Scheidler* petition has it exactly right when it says that the Seventh Circuit's "wait-and-see approach" has only "achieved the worst of all worlds by prejudging the outcome on remand yet prolonging already-protracted litigation by pretending to leave the district court with the first take on the [Hobbs Act] issue." *Scheidler* Pet. at 18. The question whether the Hobbs Act criminalizes every act or threat of physical violence, be it tied to a robbery or extortion or not, is ripe for review. There is nothing to gain, and plenty to lose, from waiting. This Court should grant the petition.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

May 11, 2005

Nos. 04-1244, 04-1352

Supreme Court, U.S.
FILED
SEP 2 - 2005
OFFICE OF THE CLERK

In the

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

OPERATION RESCUE,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF ALABAMA, COLORADO, DELAWARE, KANSAS, MICHIGAN, OHIO, SOUTH DAKOTA, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Troy King
Attorney General
Kevin C. Newsom
Solicitor General
Counsel of Record
STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7401

September 2, 2005

(Additional counsel for amici curiae are listed inside the front cover.)

ADDITIONAL COUNSEL

JOHN W. SUTHERS
ATTORNEY GENERAL
STATE OF COLORADO
1525 Sherman Street
7th Floor
Denver, CO 80203

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
Department of Justice
820 N. French Street
Wilmington, DE 19801

PHILL KLINE
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. 10th Avenue
Topeka, KS 66612-1597

MICHAEL A. COX
ATTORNEY GENERAL
STATE OF MICHIGAN
P.O. Box 30212
Lansing, MI 48909

JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO
State Office Tower
30 E. Broad Street
Columbus, OH 43215-3428

LAWRENCE E. LONG
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
500 East Capitol Avenue
Pierre, SD 57501

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
P.O. Box 12548
Austin, TX 78711-2548

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
Utah State Office Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-2320

QUESTIONS PRESENTED

1. Whether the Seventh Circuit, on remand, disregarded this Court's mandate by holding that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the "injunction issued by the District Court" might *not* need to be vacated.

2. Whether the Hobbs Act, 18 U.S.C. § 1951(a), punishes acts or threats of physical violence against "any person or property" in a manner that "in any way or degree * * * affects commerce," even if such acts or threats of violence are wholly unconnected to either extortion or robbery.

3. Whether injunctive relief is available in a private civil action for treble damages brought under RICO, 18 U.S.C. § 1964(c).*

---

* These questions are taken verbatim from petitioners' brief in *Scheidler v. National Organization for Women, Inc.*, No. 04-1244.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

STATEMENT 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

The Hobbs Act Cannot Reasonably Be Read To Reach Freestanding Acts or Threats of Physical Violence, Unconnected to Either Robbery or Extortion 5

I. The "Three-Way" Interpretation Cannot Be Reconciled With the Hobbs Act's Text 6

II. The "Three-Way" Interpretation Cannot Be Reconciled With the Hobbs Act's Legislative History 8

III. The "Three-Way" Interpretation Cannot Be Reconciled With the Structure of the Federal Criminal Code 11

IV. The "Three-Way" Interpretation Cannot Be Reconciled With Fundamental Principles of Federalism 14

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 15

Brecht v. Abrahamson, 507 U.S. 619 (1993) 14

Chickasaw Nation v. United States, 534 U.S. 84 (2001) 11

Clark v. Martinez, 125 S. Ct. 716 (2005) 19

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 15

Duncan v. Walker, 533 U.S. 167 (2001) 6

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 19

Engle v. Isaac, 456 U.S. 107 (1982) 14

Gregory v. Ashcroft, 501 U.S. 452 (1991) 4, 15

National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 2

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 19

Raygor v. Regents of Univ. of Minnesota, 534 U.S. 533 (2002) 15

Scheidler v. National Org. for Women, Inc., 537 U.S. 393 (2003) 1, 2, 11

United States v. Bass, 404 U.S. 336 (1971) 15

United States v. Culbert, 435 U.S. 371 (1978) 9

United States v. Franks, 511 F.2d 25 (6th Cir. 1975) 6

United States v. Kallestad, 236 F.3d 225 (5th Cir. 2000) 19

United States v. Lopez, 514 U.S. 549 (1995) ..... passim

United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3632 (U.S. Apr. 14, 2005) (No. 04-1382) 19

United States v. Morrison, 529 U.S. 598 (2000) 15, 17, 18

United States v. Rodia, 194 F.3d 465 (3d Cir. 1999) 19

United States v. Ryder, 110 U.S. 729 (1884) 11

United States v. Stephenson, 895 F.2d 867 (2d Cir. 1990) 17

United States v. Yankowski, 184 F.3d 1071 (9th Cir. 1999) 6, 9

West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991) 13

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 15

Statutes

The Hobbs Act, 18 U.S.C. § 1951 ..... passim

Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c) ..... passim

Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979 9

Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. §248 ..... 4, 11, 12

18 U.S.C. §32(a)-(b) 12

18 U.S.C. §33(a) 12

18 U.S.C. §111(a) 12

18 U.S.C. §351 12

18 U.S.C. §844(i) 12

18 U.S.C. §1201(a) 12

18 U.S.C. §1203(a) 12

18 U.S.C. §1961(1) 13

18 U.S.C. §2119 12

18 U.S.C. §2242 12

18 U.S.C. §2261(a) 12

Other Authorities

S. 1861, 91st Cong. §2(a) (1969) 13

Hearing Before the Senate Comm. on Labor and Human Resources, 103rd Cong. 1st Sess. 8 (May 12, 1993) 12

William H. Rehnquist, 1991 Year-End Report on the Federal Judiciary, The Third Branch (Admin. Office of the U.S. Courts), Jan. 1992 16

William H. Rehnquist, 1993 Year-End Report on the Federal Judiciary, The Third Branch (Admin. Office of the U.S. Courts), Jan. 1994 16

William H. Rehnquist, The 1998 Year-End Report of the Federal Judiciary, The Third Branch (Admin. Office of the U.S. Courts), Jan. 1999 16

U.S. Dep't of Justice, *Criminal Resource Manual*, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9crm02404.htm 17

ABA Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* (1998) 16

Oxford English Dictionary (2d ed. 1989) 11

Random House Webster's College Dictionary (2d ed. 1997) 11

J. Sutherland, *Statutory Construction* (3d ed. 1943) 13

Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129 (1994) 5

Jay Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 Geo. Wash. L. Rev. 1 (1997) 19, 20

Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691 (1999) 13

INTEREST OF AMICI

Traditionally, courts have read the federal Hobbs Act to permit criminal prosecution (or civil liability) only in cases involving either robbery or extortion. In the decision below, the Seventh Circuit broke ranks and held that, in addition to those two discrete crimes, the Hobbs Act can be construed to punish *any* act or threat of physical violence to *any* person or property that in *any* way affects interstate commerce. The States' interests in this case are two-fold. First, the States have a compelling interest in resisting the federalization of the criminal law, an area "where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 564 (1995). Second, the States have a keen interest in ensuring that their officers and employees, who necessarily engage in acts and threats of physical violence to persons (as in day-to-day police work) and property (as when condemning blighted buildings) are protected against over-expansive constructions of the Hobbs Act and its fellow traveler, RICO.

STATEMENT

In briefing this case several years ago, the State of Alabama argued that, by essentially ignoring the requirement that property be "obtain[ed]" to trigger Hobbs Act liability for extortion, the Seventh Circuit had expanded the Hobbs Act's (and, by extension, RICO's) scope in a way that was "truly breathtaking – and troubling." Br. for the State of Alabama as Amicus Curiae at 10, *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393 (2003) (Nos. 01-1118, 01-1119) (cert. stage). By an 8-1 margin, this Court agreed and held that it is not enough for Hobbs Act purposes that an individual be induced "'to give up' property rights"; rather, a party liable for extortion under that Act must not only deprive his victim of her property but also acquire – in the words of the statute, "obtain[]" – that property for himself. *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 400-09

(2003) (hereinafter "*Scheidler II*"[1]). Any other reading, this Court said, would constitute an "unwarranted expansion" of the Hobbs Act's definition of extortion. *Id.* at 402.

Then, on remand from this Court's reversal, in the decision now under review, the Seventh Circuit opened up another, more problematic can of worms. The court of appeals suggested (contrary to existing understanding) that robbery and extortion are *not* the only two offenses that can give rise to Hobbs Act liability. There is, the Seventh Circuit said, a third "way." Pet. App. 8a.[2] Specifically, that court held that it may well be enough for a Hobbs Act prosecutor (or plaintiff) to show – without reference to any robbery or extortion – that another person has "commit[ted] or threaten[ed] physical violence to any person or property" in a way that somehow "obstruct[s], delay[s], or affect[s] commerce." Pet. App. 26a-29a (panel); Pet. App. 6a-15a (rehearing). Thus, the Seventh Circuit left open to the district court the question whether four claimed "acts or threats of physical violence" – acts freestanding in the sense that they bear no relation to any alleged robbery or extortion – could alone support Hobbs Act (and RICO) liability. *See* Pet. App. 27a-28a.

The Seventh Circuit's construction of the Hobbs Act this go around is even more "breathtaking" and "troubling" than before. Last time, at least, the court of appeals' expansion of the Hobbs Act was limited to the term "extortion"; a deprivation of property, that court said – even without an accompanying acquisition – was sufficient to constitute Hobbs Act extortion. (Again, we disagreed, as did this Court.) This time, it seems to us, the stakes are much higher. This time, the Seventh Circuit is not just tweaking or massaging an *existing* basis for Hobbs Act liability –

[1] "*Scheidler I*" being *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

[2] All "Pet. App." references are to the appendix submitted with the petition in *Scheidler v. National Organization for Women, Inc.*, No. 04-1244.

"extortion" means this, or "robbery" means that. This time, the Seventh Circuit has opened up an *entirely new* avenue – a third "way," to use that court's terminology – to Hobbs Act liability. The Seventh Circuit's decision here leaves open the possibility that neither extortion nor robbery is a necessary ingredient of a Hobbs Act violation, at all – that it is enough for a person simply to commit or threaten violence (either to another person or to property) in any way that affects interstate commerce.

That overbroad reading of the Hobbs Act, we respectfully submit, is simply not defensible by reference to any traditional tool of statutory interpretation.

SUMMARY OF ARGUMENT

The court of appeals' "three-way" reading of the Hobbs Act is irreconcilable with the Act's text and legislative history, with the structure of the federal criminal code, and with fundamental principles of federalism. It should be rejected.

1. The Hobbs Act is straightforwardly and sensibly read to embody (1) a core prohibition on robbery and extortion and (2) complementary prohibitions on (a) attempts and conspiracies to rob or extort and, more importantly here, (b) acts and threats of physical violence associated with robberies and extortion. The three-way interpretation, by contrast, requires either mangled transitions, grammatical circularity, or both.

2. The Hobbs Act's legislative history likewise supports the traditional understanding and condemns the three-way reading. Both the Anti-Racketeering Act (the predecessor of the Hobbs Act) and the Hobbs Act itself as originally enacted demonstrate that in order to be actionable an act or threat of physical violence must accompany robbery or extortion. As the Seventh Circuit itself acknowledged, there is absolutely no indication that Congress intended to usher

in any substantive change in the law when it restructured the Hobbs Act in 1948.

3. The three-way interpretation of the Hobbs Act would also wreak havoc with the federal criminal code. By making any act or threat of physical violence – standing alone – a federal offense, the three-way reading would render essentially superfluous a whole host of other, more specific, federal criminal statutes – among them, the FACE Act, which deals expressly with the issue of clinic violence, as well as provisions criminalizing assault, arson, kidnapping, hostage-taking, carjacking, and sexual abuse. At the same time, the three-way interpretation would dramatically expand RICO's reach, inasmuch as crimes (like assault) that are not listed as RICO predicate offenses could be dressed up as violations of the Hobbs Act (which is listed) and charged as predicates nonetheless.

4. Perhaps most fundamentally, the three-way reading contravenes the most basic tenets of Our Federalism. First, whether or not the three-way interpretation would actually render the Hobbs Act unconstitutional, it would serve to federalize essentially all violent crime, a subject over which the States have traditionally exercised sovereign control. Under *Gregory v. Ashcroft*, 501 U.S. 451 (1991), and subsequent cases applying its clear-statement principle, this Court should be slow to attribute to Congress such a sweeping redistribution of power. Second, the three-way reading actually does pose significant Commerce Clause (and, as it turns out, Domestic Violence Clause) questions. The Hobbs Act should be read to avoid those questions, not to invite them.

ARGUMENT

The Hobbs Act Cannot Reasonably Be Read To Reach Freestanding Acts or Threats of Physical Violence, Unconnected to Either Robbery or Extortion.[3]

In relevant part, the Hobbs Act provides as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. §1951(a).

The Seventh Circuit posited "two possible interpretations of this language." Pet. App. 8a. "'First it may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion." *Id.* (quoting Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129, 142-43 (1994)). Alternatively, the court of appeals said, it might instead "'forbid[] threatening or committing physical violence in furtherance of a plan to "obstruct, delay, or affect commerce" (other than through robbery or extortion).'" *Id.* (quoting Bradley, *supra*, at 143). In other words, the Seventh Circuit summarized, the Hobbs Act lends itself to both a "two-way" interpretation – the two prohibited acts being robbery and extortion – and a "three-way" interpretation – under which, in addition to robbery and extortion, "physical violence" alone can support a Hobbs Act claim. *See id.* The Seventh Circuit explicitly held open – and seemed at least

---

[3] Amici address here only the second Question Presented, which pertains to the proper interpretation of the Hobbs Act.

implicitly to endorse – the broader, three-way interpretation. *See* Br. for the States of Alabama *et al.* at 5-6 (cert. stage).

The Sixth and Ninth Circuits, by contrast, have definitively rejected the so-called three-way reading. The Sixth Circuit, for its part, said that it could not "accept the government's view that the statute proscribes all physical violence obstructing, delaying, or affecting commerce"; rather, that court held, §1951(a)'s "language and legislative history require that the violence be in furtherance of a plan or purpose to obstruct, delay, or affect commerce *by extortion or robbery*." *United States v. Franks*, 511 F.2d 25, 31 (6th Cir. 1975) (emphasis added). The Ninth Circuit was even less charitable: It described as "untenable" and "fatally flawed" the Government's view that "the Hobbs Act criminalizes any act of violence to person or property that has an effect on commerce, even if the alleged violent act had no connection to any executed or planned robbery or extortion." *United States v. Yankowski*, 184 F.3d 1071, 1072, 1073 (9th Cir. 1999).

This Court granted certiorari, in part, to clarify the Hobbs Act's proper construction. Amici respectfully submit that the so-called three-way interpretation of the Hobbs Act is indeed, as the Ninth Circuit has said, "untenable" and "fatally flawed." The Act's text and legislative history, statutory structure, and fundamental principles of federalism combine to condemn the freewheeling three-way reading that the Seventh Circuit's decision so struggles to preserve.

I. The "Three-Way" Interpretation Cannot Be Reconciled With the Hobbs Act's Text.

First, there is the Hobbs Act's plain language. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 172 (2001) ("Our task is to construe what Congress has enacted. We begin, as always, with the language of the statute."). Because a careful textual analysis is in order here, we set out that language again:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. §1951(a).

The Seventh Circuit believed that "[g]rammatically, the text can be read either way" – that is, to support either the two-way or the three-way interpretation – "without undue strain." Pet. App. 8a. We disagree. As a matter of grammar, the three-way interpretation of §1951(a) seems to us quite "strain[ed]." Reading the Act to make physical violence a stand-alone violation is worse than awkward: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce ... commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section ...." The transition between the preambular clause about "commerce" and the phrase "commits or threatens physical violence" just doesn't work. And, it should be noted, the difficulty cannot be alleviated by keeping the word "or" with the phrase "commits or threatens physical violence." While that might solve grammatical problems (allowing for a workable transition), it would have the effect, as well, of making the act of "obstruct[ing], delay[ing], or affect[ing] commerce" *itself* a stand-alone Hobbs Act offense – an interpretation that, to our knowledge, no one has endorsed.

The Seventh Circuit's three-way reading suffers from an additional textual flaw. The Hobbs Act's physical-violence clause applies only to one who "commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section*." 18

U.S.C. §1951(a) (emphasis added). The italicized language seems quite clearly to refer back to something that has come before - something that constitutes the relevant "violation of this section." If, as the Seventh Circuit's opinion suggests, an act or threat of physical violence may *itself* constitute the relevant "violation of this section," then the physical-violence clause would be read to apply to anyone who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose to *commit or threaten physical violence to any person or property*." That circular formulation, of course, doesn't make any sense.

Far and away the best reading of the Hobbs Act goes like this: At its core, the Act applies to any person who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, *by robbery or extortion*." 18 U.S.C. §1951(a) (emphasis added). The two clauses that follow both refer back to that core prohibition. First, the Act targets anyone who "attempts or conspires *so to do*" - that is, attempts or conspires to obstruct, delay, or affect commerce by robbery or extortion. *Id.* (emphasis added). Second, and more immediately relevant here, the Act reaches anyone who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of this section*" - that is, commits or threatens violence in furtherance of a plan to obstruct, delay, or affect commerce by robbery or extortion. *Id.* (emphasis added). Under this sensible and straightforward reading, §1951(a) entails (1) a core prohibition on robbery and extortion and (2) complementary prohibitions on (a) attempts and conspiracies to rob or extort and (b) acts or threats of violence associated with robberies and extortion.

II. The "Three-Way" Interpretation Cannot Be Reconciled With the Hobbs Act's Legislative History.

Not surprisingly, the Hobbs Act's legislative history leads to precisely the same conclusion. Indeed, two separate

pieces of legislative history expose the error of the three-way interpretation. First, there is the Anti-Racketeering Act of 1934, which this Court has called the "predecessor to the Hobbs Act." *United States v. Culbert*, 435 U.S. 371, 375 n.5 (1978). The Anti-Racketeering Act, as summarized by the Ninth Circuit in *Yankowski* (and as acknowledged by the Seventh Circuit here, *see* Pet. App. 11a-12a), provided that "[a]ny person who, in connection with or in any degree affecting trade or commerce (a) commits or attempts extortion of money, or (b) obtains property through extortion, or (c) *'commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b),'* or (d) conspires with respect to (a), (b) or (c) ... shall be imprisoned or fined." 184 F.3d at 1073 n.5 (quoting Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979) (emphasis added). That, at least as far as extortion is concerned, is very nearly exactly the prohibition expressed by the plain language of the present-day Hobbs Act: Physical violence is not itself the object of the statute - extortion is - but only one means of accomplishing that object. Petitioners specifically brought the Anti-Racketeering Act to the Seventh Circuit's attention in their petition for rehearing[4]; conspicuously, however, the Seventh Circuit had nothing to say about either the Anti-Racketeering Act or what it might spell for the three-way interpretation.

Second, there is the language of the Hobbs Act as originally enacted in 1946. The "fit" between the original Act (which we quote at length below) and the plain-language reading of the current version is remarkable:

> Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any

---

[4] *See* Pet. for Rehearing and En Banc Rehearing of Defendants-Appellants Joseph Scheidler *et al.* at 10-11, *National Org. for Women, Inc. v. Scheidler*, Nos. 99-3076, 99-3336, 99-3891, 99-3892, and 01-2050 (Mar. 10, 2004).

article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

Pub. L. No. 486, 60 Stat. 420 (1946). The conclusion is unmistakable: The core prohibition (in the 1946 Act, Section 2) targets "robbery [and] extortion"; the complementary prohibitions against conspiracies (Section 3), attempts (Section 4), and physical violence (Section 5) do not stand alone but, rather, all refer back to the core prohibition. All of which, we submit, dovetails precisely with the best reading of the Hobbs Act as currently structured.

The Seventh Circuit acknowledged that, as enacted in 1946, the Hobbs Act "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." Pet. App. 15a. But, the court said, it was not until 1948 that the Act "assumed its present form." *Id.* And while conceding that the 1948 revisions "were intended to be formal, stylistic changes," the Seventh Circuit supposed that it was "not beyond the realm of possibility that the revisers may have made certain substantive changes either advertently or inadvertently." *Id.* There are three fundamental problems with the court of appeals' reasoning in this respect, which we will mention briefly. First, if, as the Seventh Circuit admits, the 1948 changes were "intended" to be only formal and stylistic, then, by definition, any

substantive changes could not have been "advertent," but must have been accidental, instead. *See, e.g., 7 Oxford English Dictionary* 770 (2d ed. 1989) (defining "inadvertent" to mean "unintentional"); *Random House Webster's College Dictionary* 658 (2d ed. 1997) (same). Second, whatever one's particular theory of statutory interpretation, the aim, all presumably agree, is to discern and enforce Congress' intent. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). If, as the Seventh Circuit acknowledges, Congress had no "inten[tion]" in 1948 to make substantive changes to the Hobbs Act, then none should be attributed. And, finally, this Court has steadfastly refused to "infer[] that the legislature, in revising and consolidating the laws" – as it did with the Hobbs Act in 1948 – "intended to change their policy, unless such intention *be clearly expressed*," which all acknowledge it was not here. *United States v. Ryder*, 110 U.S. 729, 740 (1884).

III. The "Three-Way" Interpretation Cannot Be Reconciled With the Structure of the Federal Criminal Code.

In addition to textual and historical problems, there are also at least two structural defects inherent in the three-way reading. First, an interpretation of the Hobbs Act that makes any act or threat of "physical violence" – standing alone – a federal offense has the effect of rendering essentially superfluous a whole host of other, more specific, federal criminal statutes. Perhaps the clearest example is the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. §248, which, as Justice Stevens observed in *Scheidler II*, responds directly "to the concerns that gave rise to these cases." 537 U.S. at 417 (Stevens, J., dissenting). Specifically, as relevant here, the so-called FACE Act targets anyone who "intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services." 18 U.S.C. §248(a)(3). Notably, though, the FACE Act prescribes relatively modest criminal penalties for violations: one year for a first offense and three years for subsequent offenses. *Id.* §248(b). By bluntly

punishing essentially all "physical violence" (whether against persons or property) with 20 years in prison, the three-way interpretation of the Hobbs Act supplants the congressional compromise that the FACE Act presumably embodies.[5]

And the FACE Act is only the most obvious casualty of the Seventh Circuit's overbroad reading. A host of federal criminal statutes would be effectively swallowed up by the three-way interpretation. Among them –

- 18 U.S.C. §32(a)-(b) (destruction of airplane);
- 18 U.S.C. §33(a) (destruction of motor vehicle);
- 18 U.S.C. §111(a) (assaulting a federal officer);
- 18 U.S.C. §844(i) (arson);
- 18 U.S.C. §1201(a) (kidnapping);
- 18 U.S.C. §1203(a) (hostage-taking);
- 18 U.S.C. §2119 (carjacking);
- 18 U.S.C. §2242 (sexual abuse); and
- 18 U.S.C. §2261(a) (domestic violence).

Some overlap among federal statutes is to be expected, of course. *Compare* 18 U.S.C. §1201(a) (kidnapping) *with* 18 U.S.C. §351 (kidnapping federal officer). But by broadly criminalizing "physical violence," the three-way reading of the Hobbs Act would consign a large chunk of the federal

[5] Notably, during consideration of the FACE Act, Attorney General Janet Reno testified that the Act was necessary, in part, because "existing federal laws, while perhaps applicable in some instances, [are] inadequate." *Hearing Before the Senate Comm. on Labor and Human Resources*, 103rd Cong. 1st Sess. 8 (May 12, 1993). Under the three-way interpretation of the Hobbs Act, of course, her testimony would not have been entirely accurate, 20 years in the pokey presumably being a more-than-"[]adequate" deterrent to clinic violence.

criminal code to the dustbin. This Court should reject a statutory construction that seems so obviously to "make nonsense out of the *corpus juris*." *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100-01 (1991) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." (quoting 2 J. Sutherland, *Statutory Construction* §5201 (3d ed. 1943)).

There is a second structural problem worth noting. The three-way interpretation would have the effect of expanding RICO's scope beyond all recognizable – and intended – boundaries. RICO, of course, includes violations of the Hobbs Act among its list of predicate crimes. 18 U.S.C. §1961(1). By contrast, RICO conspicuously does *not* include as a predicate crime any of the physical-violence-based offenses listed above. Thus, for whatever reason, Congress chose not to make assault, for instance, a RICO predicate offense. But under the three-way reading, a prosecutor or plaintiff could paper over that evident gap simply by dressing up an assault-charge in Hobbs Act garb. No statute – and particularly not RICO – should be construed to be so manipulable.

One final RICO-related point: In its original incarnation, the bill that would become RICO defined "racketeering activity" sweepingly to cover "any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year." S. 1861, 91st Cong. §2(a) (1969). After the ACLU and Justice Department (among others) objected to the statute's breadth, the original "danger of violence to life, limb or property" formulation was scrapped in favor of the current delineation of specific offenses. *See* Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 Notre Dame L. Rev. 691, 697-99 (1999). By recognizing any act or threat of "physical violence" as a stand-alone Hobbs Act violation

qualifying for predicate-act status, the three-way interpretation effectively reinstates the overbroad version of RICO that Congress expressly rejected.

IV. The "Three-Way" Interpretation Cannot Be Reconciled With Fundamental Principles of Federalism.

Finally, in addition to text, legislative history, and statutory structure, there is the issue of federalism. The Seventh Circuit's sweeping reading of the Hobbs Act contravenes the most basic tenets of Our Federalism. The court of appeals flagged the federalism issue, but dismissed it casually by pointing to the presence in the Hobbs Act of "a jurisdictional element that limits its application to anyone who 'obstructs, delays, or affects commerce or the movement of any article or commodity in commerce.'" Pet. App. 12a (quoting 18 U.S.C. §1951(a)). That jurisdictional hook, the Seventh Circuit said, alleviated any difficulty with the three-way interpretation "under the Supreme Court's Commerce Clause jurisprudence." *Id.*

There are two problems. First, by focusing exclusively on the Commerce Clause question (of which more below, *see infra* at 17-19), the Seventh Circuit overlooked a more immediate problem: Whether or not it is actually unconstitutional, the three-way interpretation of the Hobbs Act has the untoward effect of *federalizing essentially all violent crime*. Under that reading, anyone who "commits or threatens" any physical violence to "any person or property," and in so doing "in any way or degree" so much as "affects" commerce, is guilty of a federal offense punishable by 20 years. That construction runs headlong into this Court's precedent, as well as common sense.

This Court has recently reiterated that "[u]nder our federal system, the '"States possess primary authority for defining and enforcing the criminal law,"'" *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982))), and, further, that "criminal law

enforcement" is an area "where States historically have been sovereign," *id.* at 564; *see also id.* at 580 (Kennedy, J., concurring) (criminal law an "area of traditional state concern"). It has long been recognized, by contrast, that Congress has no power to "punish felonies generally," *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821), and does not enjoy anything approaching a general police power over citizens' health and safety, *see United States v. Morrison*, 529 U.S. 598, 618-19 & n.8 (2000).

Relatedly, and more recently still, this Court has reiterated that "[w]hen 'Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."'" *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543 (2002) (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))). This clear-statement rule applies, the Court has explained, "when Congress 'intends to pre-empt the historic powers of the States' or when it legislates in '"traditionally sensitive areas'" that '"affec[t] the federal balance."'" *Id.* at 543-44 (quoting *Will*, 491 U.S. at 65 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))). "In such cases, the clear statement principle reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" *Id.* at 544 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461, 464 (1991)).

In view of the presumption that the criminal law is the States' domain, there is "good reason" here – as in *Atascadero*, *Will*, *Gregory*, and *Raygor* – "to rely on a clear statement principle of statutory construction." *Id.* at 543. And whatever might be said (elsewhere) in its favor, the three-way interpretation of the Hobbs Act is *not* "clear" on the face of the statute. Indeed, the Seventh Circuit itself admitted as much by observing that there are (in its view) "two possible interpretations of [the Hobbs Act's] language"

and that §1951(a)'s text "can be read either way without undue strain." Pet. App. 8a. We, of course, happen to believe that the only permissible reading of the Hobbs Act forecloses the three-way interpretation. *See supra* at 6-8. But to the extent that any ambiguity exists, this Court's cases require that it be resolved against federalization and in favor of the traditional federal-state balance.

It is worth pausing briefly to consider the real-world implications of the three-way interpretation. Untethered from the traditional anchors of robbery and extortion, Hobbs Act liability would know no end. Couldn't almost any act or threat of physical violence – whether against a person or property – be said to "affect" commerce in some way, shape, form, or fashion? Assaulting a salesman, certainly; slashing another person's tires, probably. Shoplifters, pickpockets, and other petty thieves – all would presumably be guilty of *federal* offenses (indeed, felonies) under the three-way reading. How the federal courts could be expected to handle the ensuing crush of litigation is anyone's guess.[6]

Nor, somewhat closer to home, is there anything to suggest an exemption to the freewheeling three-way construction for state and local government officials. Construed as the Seventh Circuit seemingly would allow, the Hobbs Act would sweep in a whole host of otherwise legitimate (and purely local) activities undertaken by States

[6] The over-federalization of the criminal law (and the resulting strain on federal-court resources) has been a consistent theme of the Chief Justice's annual reports on the state of the federal judiciary. *See, e.g.*, William H. Rehnquist, The 1998 Year-End Report of the Federal Judiciary, The Third Branch (Admin. Office of the U.S. Courts), Jan. 1999, at 2; William H. Rehnquist, 1993 Year-End Report on the Federal Judiciary, The Third Branch (Admin. Office of the U.S. Courts), Jan. 1994, at 1, 3; William H. Rehnquist, 1991 Year-End Report on the Federal Judiciary, The Third Branch (Admin. Office of the U.S. Courts), Jan. 1992, at 1, 3. The American Bar Association has also noted the problem. *See generally* ABA Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* (1998).

and state officers. Police officers, for instance, regularly and necessarily engage in conduct – say, in tackling a fleeing suspect – that might be deemed an act or threat of physical violence; do all such acts that somehow "affect" commerce thereby give rise to federal Hobbs Act liability? Likewise, cities and States routinely condemn property and raze buildings, and thereby "commit ... physical violence" against "property"; are those acts, too, all Hobbs Act violations?[7] Jurisprudential concerns aside, the practical consequences of the Seventh Circuit's three-way interpretation are enough to condemn it.

There is a second, separate problem with the Seventh Circuit's treatment of the federalism issue. Despite the court of appeals' offhand dismissal (Pet. App. 12a), the three-way interpretation of the Hobbs Act does, in fact, present serious Commerce Clause questions. If, as under the traditional two-way interpretation, an act or threat of physical violence must be tied to a robbery or extortion, the Hobbs Act is presumably a valid exercise of Congress' Commerce Clause power – the reason being that robbery and extortion are both "economic" activities within the meaning of this Court's decisions in *Lopez* and *Morrison*. As emphasized in *Morrison*, in every case in which this Court has "sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." 529 U.S. at 611 (citing *Lopez*, 514 U.S. 559-60). As applied to robbery and extortion – both of which, by definition, involve

[7] The same, apparently, goes for federal officials. *See United States v. Stephenson*, 895 F.2d 867, 871-73 (2d Cir. 1990) (Hobbs Act applies to federal officials); U.S. Dep't of Justice, *Criminal Resource Manual* §2404 (Hobbs Act applies to a "wide range of officials, including those serving on the federal ... level[]"), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9crm02404.htm. It is hard to imagine that Congress actually intended to make a federal felony out of every act or threat of physical violence undertaken by a federal official.

the taking of valuable private property – there is every reason to believe that the Hobbs Act is constitutional.

But that same presumption would not apply were the Hobbs Act read to apply to any act or threat of physical violence – even those *not* tied in any way to robbery, extortion, or any other "economic endeavor." Just as neither gun possession, *see Lopez*, 514 U.S. at 567, nor domestic battery, *see Morrison*, 529 U.S. at 613, is in any sense an economic activity, an act or threat of "physical violence to any person or property," 18 U.S.C. §1951(a), is not in and of itself economic. Under the three-way interpretation, therefore, the Hobbs Act would likely fall victim to the principle that undergirds both *Lopez* and *Morrison* – that the Court has "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617.

The Seventh Circuit's assumption that all Commerce Clause problems melt away by virtue of "a jurisdictional element that limits [the Hobbs Act's] application to anyone who 'obstructs, delays, or affects commerce or the movement of any article or commodity in commerce'" (Pet. App. 12a) rests on an oversimplification. To be sure, a jurisdictional hook is relevant to determining a statute's constitutionality under the Commerce Clause, but it is not alone conclusive. At most, this Court has said that a jurisdictional element "*may* establish," or "lend support to the argument," that a statute is within Congress' Commerce Clause power. *Morrison*, 529 U.S. at 612-13 (emphasis added). But to serve the proper narrowing function, a jurisdictional hook must actually "ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce." *Lopez*, 514 U.S. at 561. And not every jurisdictional element will fit that bill. *See, e.g., United States v. Maxwell*, 386 F.3d 1042, 1062 (11th Cir. 2004) ("Congress cannot guarantee the proper use of its authority by creating jurisdictional hooks that relate to interstate commerce in some way but fail in all cases to confine the scope of its regulation to Constitutional boundaries."), *petition for cert. filed*, 73 U.S.L.W. 3632 (U.S. Apr. 14, 2005) (No. 04-1382); *United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000) (same); *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999) (same). In the end, whether a statute includes a formal jurisdictional element or not, the test remains whether, as a substantive matter, Congress has observed "the distinction between what is national and what is local." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). As one court put the matter, if "uttering pretextual incantations evoking the phantasm of commerce" alone were sufficient, "Congress could federalize the crime of murder by inserting a statutory element that requires the prosecution to prove that the defendant ate a cheeseburger that traveled in interstate commerce." *Maxwell*, 386 F.3d at 1062.

To be sure, the Seventh Circuit's three-way reading of the Hobbs Act may not correlate precisely to the hypothetical "murder-with-cheeseburger" law. But the basic point remains: The three-way interpretation effectively federalizes all violent crime, and the rote insertion of a boilerplate "in any way ... affects commerce" clause does nothing to justify Congress' intrusion into an area of traditional state concern. At the very least, under the principle that statutes should be construed to avoid constitutional problems, the Hobbs Act should be read, as the Sixth and Ninth Circuits have read it, to require a connection between an alleged act or threat of violence and an (economic) act of robbery or extortion. *See, e.g., Clark v. Martinez*, 125 S. Ct. 716, 724-25 (2005) (describing avoidance canon); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Far from

avoiding constitutional doubt, the Seventh Circuit's overbroad interpretation actually invites it.[8]

* * *

The Seventh Circuit's "three-way" reading of the Hobbs Act is irreconcilable with the Act's plain language and legislative history, the overarching structure of the federal criminal code, and fundamental principles of federalism. It should be rejected.

---

[8] Reading the Hobbs Act to make federal crimes of all acts of "physical violence," whether connected to robbery or extortion or not, would also raise significant questions under the principles of federalism embodied in the "[l]ong ignored" Domestic Violence Clause of Article IV. Jay Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 Geo. Wash. L. Rev. 1, 3-4 (1997). That Clause provides that "[t]he United States ... shall protect [every State in this Union] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const. art. IV, §4. As now-Judge Bybee's thorough historical treatment amply demonstrates, the term "domestic Violence" in the Clause was originally understood, and has since traditionally been understood, as applying not just to violence in the open-rebellion sense but also to violence of the more ordinary sort. *See id.* at 34-39. And further - and this is the point - by requiring that the Federal Government await a State's formal "Application" before intervening, the Clause serves as a "reaffirmation of the enumerated powers doctrine and a promise of federal nonintervention that prohibits not only the uninvited use of federal forces to combat crime, but also forbids federal legislation that displaces the states' obligation to protect their citizens by suppressing domestic violence." *Id.* at 4.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals' judgment.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

September 2, 2005

(11) (9)

Nos. 04-1244 and 04-1352

Supreme Court, U.S.
FILED
SEP 2 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Respondents.

OPERATION RESCUE,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

JONATHAN P. HIATT
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	15

TABLE OF AUTHORITIES

CASES — Page

Scheidler v. NOW, 537 U.S. 393 (2003) 13, 14
Tidewater Oil Co. v. United States, 409 U.S. 151 (1972) 11
United States v. Enmons, 410 U.S. 396 (1973) 13, 15
United States v. Franks, 511 F.2d 25 (6th Cir. 1975) 12-13
United States v. Kennedy, 133 F.3d 53 (D.C. Cir. 1998) 5
United States v. Yankowski, 184 F.3d 1071 (9th Cir. 1999) 5

STATUTES

Hobbs Act:
18 U.S.C. § 1951 ..... *passim*
18 U.S.C. § 1951(a) ..... *passim*
18 U.S.C. § 1951(b) 3
18 U.S.C. § 1951(c) 3

MISCELLANEOUS

Bradley, *Now v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129 (1994) 12
H.R. 32, 79th Cong., 1st Sess. (1945) 7
H.R. Rep. No. 238, 79th Cong., 1st Sess. (1945) .. 7
H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947) ... 10, 11
LaFave, *Substantive Criminal Law* (2d ed. 2003) 12
Public Law 486, 60 Stat. 420, 18 U.S.C. § 420a, *et seq.* (1946) ..... *passim*
S. Rep. No. 1516, 79th Cong., 2d Sess. (1946) 7
S. Rep. No. 1620, 80th Cong., 2d Sess. (1948) 10

IN THE

Supreme Court of the United States

Nos. 04-1244 & 04-1352

JOSEPH SCHEIDLER, *et al.*,
Petitioners,
v.
NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Respondents.

OPERATION RESCUE,
Petitioner,
v.
NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations, a federation of 53 national and international labor organizations with a total membership of 9 million working men and women, files this brief *amicus curiae* in support of Petitioners with the consent of the parties as provided for in the Rules of this Court.[1]

---

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Hobbs Act, as codified in 18 U.S.C. § 1951, sets out in § 1951 (a)'s three clauses, three interrelated federal "robbery or extortion" criminal violations:

> *First*, to "obstruct[], delay[] or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion";
>
> *Second*, to "attempt[] or conspire[]" to obstruct, delay or affect commerce or the movement of any article or commodity in commerce by robbery or extortion; and
>
> *Third*, to "commit[] or threaten[] physical violence to any person or property in furtherance of a plan or purpose" to obstruct, delay or affect commerce or the movement of any article or commodity in commerce by robbery or extortion.

That is plain from the language of 18 U.S.C. § 1951, which was enacted by the 80th Congress as part of the 1948 Act to Revise and Codify Title 18 of the United States Code. And, it is confirmed by the 1946 Hobbs Act's original statutory language enacted by the 79th Congress as Public Law 486, 60 Stat. 420 (1946)—statutory language the 1948 recodification tracked and consolidated without any intent to effect any substantive change in the Hobbs Act's scope or nature.

The Seventh Circuit's proposal to expand the Hobbs Act's third—"physical violence"—clause to reach physical violence not related to robbery or extortion cannot be squared with the language of 18 U.S.C. § 1951(a). What is more, as the Seventh Circuit conceded, its proposal is contrary to and would override the plain meaning of the 1946 Hobbs Act—the source for 18 U.S.C. § 1951(a). And, contrary to that court's claim, the Seventh Circuit's proposal is not necessary in order to save 18 U.S.C. § 1951(a)'s third—"physical violence"—clause from being redundant of the first two clauses in that section. In addition, the Seventh Circuit's approach is

inconsistent with this Court's approach in prior decisions construing the Hobbs Act.

Simply stated, the Seventh Circuit's proposal to expand the Hobbs Act's reach beyond "robbery or extortion" is wrong on every score.

ARGUMENT

The Hobbs Act, 18 U.S.C. § 1951, extends the federal criminal law to reach "robbery or extortion" that "affects commerce" in all its guises. That Act does not extend the federal criminal law further in order to reach "physical violence" that is *not* related to "robbery or extortion." That is plain from the language of 18 U.S.C. § 1951, which was enacted by the 80th Congress as part of the 1948 Act to Revise and Codify Title 18 of the United States Code. And, it is confirmed by the 1946 Hobbs Act's original statutory language enacted by the 79th Congress as Public Law 486, 60 Stat. 420—statutory language the 1948 recodification tracked and consolidated without any intent to effect any substantive change in the Hobbs Act's scope or nature.

1. Section 1951(a)—the Hobbs Act's operative provision—states:

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."[2]

---

[2] Subsection (b), in its turn, defines the terms "robbery", "extortion" and "commerce" as those terms are used in subsection (a). 18 U.S.C. § 1951(b). And, subsection (c), adds that the Act does not "repeal, modify or affect" various other statutory provisions. 18 U.S.C. § 1951(c).

Section 1951(a) is composed of three grammatically parallel substantive clauses, each delineating one of three interrelated federal "robbery or extortion" criminal violations:

> *First*, to "obstruct[], delay[] or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion";
>
> *Second*, to "attempt[] or conspire[]" to obstruct, delay or affect commerce or the movement of any article or commodity in commerce by robbery or extortion; and
>
> *Third*, to "commit[] or threaten[] physical violence to any person or property in furtherance of a plan or purpose" to obstruct, delay or affect commerce or the movement of any article or commodity in commerce by robbery or extortion.

With respect to the third of these criminal violations—the only one now at issue in this case—the operative statutory language is "commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." The pivotal phrase in the foregoing is "to do anything in violation of this section." In order to determine whether someone is "do[ing] anything in violation of this section," it is necessary to refer to the "violations" defined in the preceding clauses of § 1951(a). And, those violations are: i) "obstruct[ing], delay-[ing] or affect[ing] commerce or the movement of any article or commodity in commerce, by robbery or extortion"; and ii) "attempt[ing] or conspir[ing] so to do."

Thus, neither of § 1951(a)'s first two clauses makes it a federal crime to "obstruct[], delay[] or affect[] commerce or the movement of any article or commodity in commerce" in any manner other than through "robbery or extortion." It follows that someone who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose to" obstruct, delay or affect commerce through some means other than "robbery or extortion" cannot be said to

have acted "in furtherance of a plan or purpose to do anything in violation of this section."

In this regard, "[t]he statutory language is clear: A person may violate the Hobbs Act by committing or threatening a violent act against person or property, but only if it is in furtherance of a plan to interfere with commerce *by extortion or robbery*." *United States v. Yankowski*, 184 F.3d 1071, 1073 (9th Cir. 1999). *Accord United States v. Kennedy*, 133 F.3d 53, 57 (D.C. Cir. 1998) ("The Hobbs Act thus prohibits interference with interstate commerce through either robbery or extortion.").

2. (a) The foregoing reading of 18 U.S.C. § 1951(a) is confirmed by the language of the statutory source of that provision, the 1946 Hobbs Act enacted as Public Law 486, 60 Stat. 420.

The operative language of the 1946 Hobbs Act is contained in the following sections from title I of that statute:

> "Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> "Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> "Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> "Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a

plan or purpose to do anything in violation of section 2 shall be guilty of a felony." 60 Stat. 420.[3]

Congress could not have been any clearer in framing the four federal criminal violations established by the 1946 Hobbs Act.

To begin with, title I, section 2 states the basic violation by making it a federal crime to "obstruct[], delay[], or affect[] commerce, or the movement of any article or commodity in commerce, by robbery or extortion."

Then, having stated the basic violation in section 2—*viz.*, affecting commerce by robbery or extortion—the 1946 Act goes on in sections 3, 4 and 5 to delineate three other crimes, each related to the basic violation stated in section 2:

- Section 3 makes it a federal crime to "conspire[] with another or with others, or act[] in concert with another or with others to do anything in violation of section 2 [*viz.*, anything to affect commerce by robbery or extortion]."
- Section 4 makes it a federal crime to "attempt[] or participate[] in an attempt to do anything in violation of section 2 [*viz.*, anything to affect commerce by robbery or extortion]."
- Section 5 makes it a federal crime to "commit[] or threaten[] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 [*viz.*, anything to affect commerce by robbery or extortion]."

Given the extraordinary care Congress took to precisely delineate each of these separate federal crimes, even the Seventh Circuit was forced to acknowledge that the 1946

[3] Section 1 of title I defined the terms "commerce," "robbery," and "extortion." Section 6 of title I stated the penalty for violating sections 2-5. And, title II stated that nothing in the Hobbs Act should be construed to modify the Clayton, Norris-LaGuardia, Railway Labor and National Labor Relations Acts.

Hobbs Act "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." Pet. App. 15a.[4]

The legislative materials confirm that the 1946 Hobbs Act's statutory language accurately reflects Congress's intent.

The Hobbs Act originated in the House Committee on the Judiciary as H.R. 32, 79th Cong., 1st Sess. (1945). The Committee Report explains that the basic purpose of the bill, as stated in its title I, section 2, is "to prevent interference with interstate commerce by robbery or extortion." H. R. Rep. No. 238, 79th Cong. 1st Sess. 1 (1945). The House Report further explains that, in addition, the bill reaches, in title I, sections 3, 4 and 5, conspiracy or attempt to do anything to affect commerce by robbery or extortion as well as the commission or threat of violence in the furtherance of a plan to affect commerce by robbery or extortion:

> "The objective of title I is to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion as defined in the bill. A conspiracy or attempt to do anything in violation of section 2 [making robbery and extortion affecting commerce a federal felony] is likewise made punishable, as is the commission or threat of physical violence to any person or property in furtherance of a plan to violate section 2." *Id.* at 9.

The Senate Committee on the Judiciary "report[ed] the [House] bill to the Senate favorably, without amendment, and recommend[ed] that the bill do pass." S. Rep. No. 1516, 79th Cong., 2d Sess., 1 (1946). And, the Senate Report explained the bill in precisely the same terms as the House Report. *Ibid.*

[4] "Pet. App." references in this brief are to the appendix to the petition for certiorari in case no. 04-1244.

(b) Sections 2 through 5 of the 1946 Hobbs Act were initially codified as 18 U.S.C. §§ 420a through 420d (1946 ed.). Section 420a tracked the language of section 2 of the 1946 Act exactly. Sections 420b, 420c and 420d tracked the language of sections 3, 4 and 5 of the 1946 Act exactly, with the exception that in each code section the original reference to "section 2" was changed to a reference to "section 420a of this title."

In 1948, 18 U.S.C. §§ 420a-420d were combined into the present 18 U.S.C. § 1951(a) as part of the general recodification of Title 18 of the United States Code. The question then becomes whether the 1948 recodification of the 1946 Hobbs Act worked any substantive change in—indeed a major expansion of—the Act's reach. It could not be clearer that the answer is "no."

In the first place, a comparison of the 1946 Hobbs Act's title I, sections 2-5 as initially codified in 18 U.S.C. §§ 420a-420d and the 1948 recodification's 18 U.S.C. § 1951(a) shows that the sole office of the latter is to consolidate the four operative sections of the 1946 Act into a single more succinct section which tracks the exact substance of the 1946 Act.

The first clause of § 1951(a) tracks the language of section 2 of the 1946 Hobbs Act word for word. *Compare* 18 U.S.C. § 1951(a) ("Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . .") *with* 18 U.S.C. § 420a (1946 ed.) ("Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion . . . .").[5]

[5] Section 2 of the Hobbs Act as enacted in 1946 and as codified at 18 U.S.C. 420a contained an arguable grammatical error in that it set off the phrase "or the movement of any article or commodity in commerce" with commas. 60 Stat. 420. The 1948 recodification corrected this error by eliminating the first comma.

The second clause of § 1951(a) states in a single phrase the conspiracy and attempt crimes stated in title I, sections 3 and 4 of the 1946 Hobbs Act. *Compare* 18 U.S.C. § 1951(a) ("attempts or conspires so to do") *with* 18 U.S.C. § 420b (1946 ed.) ("conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 420a of this title [section 2 of the Act]") & 18 U.S.C. § 420c (1946 ed.) ("attempts or participates in an attempt to do anything in violation of section 420a of this title [section 2 of the Act]").

And, the third clause in § 1951(a) tracks the language of title I, section 5 of the 1946 Hobbs Act with one difference. *Compare* 18 U.S.C. § 1951(a) ("commits or threatens physical violence to any person or property in furtherance of a plan to do anything in violation of this section") *with* 18 U.S.C. § 420d (1946 ed.) ("commits or threatens physical violence to any person or property in furtherance of a plan to do anything in violation of section 420a of this title [section 2 of the Act]").

The one difference between 18 U.S.C § 1951(a) and 18 U.S.C. § 420d is that the former substitutes the phrase "this section" for the original version's "section 420a of this title [section 2 of the Act]." The obvious reason for this difference is that the 1948 recodification eliminated the 1946 Hobbs Act's four separately numbered operative sections and consolidated those four sections into a single section. The self-evident point is that the referent for "violation of this section" in § 1951(a) like the referent for "violation of section 2" in section 5 of the 1946 Act is a plan to do anything to "affect commerce . . . *by robbery or extortion.*"

What is apparent on the face of § 1951(a) is confirmed by the Reviser's Notes to the 1948 recodification. These Notes

were reproduced in full as an appendix to the House Report on the bill effecting the recodification. H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947). The House Report explains that "[t]he reviser's notes are keyed to sections of th[e] bill and explain in detail every change made in text" to Title 18 of the U.S. Code. *Id.* at 9. And, the introduction to the appendix containing the Reviser's Notes, reiterates that the Notes "explain[] in detail the revision of each section of the Federal criminal laws." *Id.* at A1. The companion Senate Report on the recodification bill referred to the Reviser's Notes contained in the appendix to the House Report "[f]or a detailed explanation" of the recodification. S. Rep. No. 1620, 80th Cong., 2d Sess., 2 (1948).

The detailed explanation of 18 U.S.C. § 1951 contained in the Reviser's Notes states in full:

> "Section 1951—Section Revised
>
> "Based on title 18, U.S.C., 1940 ed., §§ 420a-420e-1 (June 18, 1934, ch. 569, §§ 1-6, 48 Stat. 979, 980; July 3, 1946, ch. 537, 60 Stat. 420).
>
> "Section consolidates sections 420a-420e-1 of title 18, U.S.C., 1940 ed., with changes in phraseology and arrangement necessary to effect consolidation.
>
> "Provisions designating offense as felony were omitted as unnecessary in view of definitive section 1 of this title. (See reviser's note under section 550 of this title.)
>
> "Subsection (c) of the revised section is derived from title II of the 1946 amendment. It substitutes references to specific sections of the United States Code, 1940 ed., in place of references to numerous acts of Congress, in conformity to the style of the revision bill. Subsection (c) as rephrased will preclude any construction of implied repeal of the specified acts of Congress codified in the sections enumerated.

> "The words 'attempts or conspires so to do' were substituted for sections 3 and 4 of the 1946 act, omitting as unnecessary the words 'participates in an attempt' and the words 'or acts in concert with another or with others', in view of section 2 of this title which makes any person who participates in an unlawful enterprise or aids or assists the principal offender, or does anything towards the accomplishment of the crime, a principal himself.
>
> "Words 'shall, upon conviction thereof,' were omitted as surplusage, since punishment cannot be imposed until a conviction is secured." H.R. Rep. No. 304, A131; 18 U.S.C. App. 2591-92 (1946 ed.).

"[T]he function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification. Consequently, a well-established principle governing the interpretation of provisions altered in the 1948 revision is that 'no change is to be presumed unless clearly expressed.' *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957)." *Tidewater Oil Co. v. United States*, 409 U.S. 151, 162 (1972) (footnote omitted). The explanation of 18 U.S.C. § 1951 in the Reviser's Notes makes plain that the recodification of the Hobbs Act worked no substantive change in the federal criminal law as it was stated in the statutory language of the 1946 Hobbs Act.

3. Against all of that, the Seventh Circuit's only justification for straining to recast the third clause of 18 U.S.C. § 1951(a) to make it a federal crime to commit or threaten physical violence in furtherance of a plan to affect commerce in any manner is the "well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless." Pet. App. 14a. According to the court below, "[o]ne who commits violence in furtherance of a plan to commit robbery or extortion has either committed, attempted, or conspired to commit robbery or extortion and thus has violated the first clause, rendering the third [physical

violence] clause nugatory" if that clause is read as relating only to a plan to commit robbery or extortion. Pet. App. 13a, quoting Bradley, "*Now v. Scheidler*: RICO Meets the First Amendment," 1994 Sup. Ct. Rev. 129, 143 (1994).

But this reflects a basic misunderstanding of the criminal law. It is simply not the true that "[o]ne who commits violence in furtherance of a plan to commit robbery or extortion has either committed, attempted, or conspired to commit robbery or extortion." In order to commit "robbery or extortion," as those crimes are defined in the Hobbs Act, one must actually "obtain[] property" from the victim. 18 U.S.C. § 1951(b)(1) & (2). And, in order to "attempt" or "conspire" to commit either "robbery" or "extortion," one must act with the specific intent necessary to committing those crimes. *See* LaFave, *Substantive Criminal Law*, vol. 2, § 11.3(a), p. 211 & § 12.2(c) pp. 275-277 (2d ed. 2003) (describing the "mental state" required for the crimes of "attempt" and "conspiracy"). Thus, it is possible to "commit[] violence in furtherance of a plan to commit robbery or extortion" without committing "robbery or extortion" or conspiracy to commit "robbery or extortion" or attempted "robbery or extortion" just so long as no property changes hands and the person committing the violence is not acting with the specific intent of committing robbery or extortion.

The fact that the third crime defined by the Hobbs Act is not redundant of the first two crimes was lucidly explained by the Sixth Circuit in *United States v. Franks*, 511 F.2d 25 (1975):

> "The Hobbs Act, by the plainest of language, proscribes 'physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.' The statute makes clear that a plan or purpose 'in violation of this section' includes a plan or purpose of 'obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery or extortion. . . .' Thus, if one commits physical violence affecting commerce in furtherance of a plan of obstructing, delaying or affecting commerce 'by robbery or extortion,' he has violated the Hobbs Act. * * * We construe the statute as reaching physical violence designed to culminate in extortion, even if the scheme aborts prior to extortion. Likewise, we cannot accept the . . . view that the statute proscribes all physical violence obstructing, delaying, or affecting commerce. The statute's language and legislative history require that the violence be in furtherance of a plan or purpose to obstruct, delay, or affect commerce by extortion or robbery." 511 F.2d at 31 (citation omitted).

The Seventh Circuit dismissed this reasoning with the response that "[i]t seems unlikely that Congress included the 'violence' language to capture such a tiny set of academic hypotheticals." Pet. App. 14a. That is no response at all.

In the first place, even the Seventh Circuit understands that the 1946 Congress did include the "violence language to capture such . . . hypotheticals," for that court recognized that the 1946 Hobbs Act "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." Pet. App. 15a. Moreover, the Seventh Circuit's admission that there is not a complete overlap between the "robbery or extortion" and "attempt or conspir[acy]" crimes and the "physical violence" crime—however "tiny" the gap may appear to the court below—refutes the Seventh Circuit's critical assertion that the latter is redundant of the former.

4. The Seventh Circuit's suggestion that the Hobbs Act might be read to criminalize "threatening or committing physical violence in furtherance of a plan to 'obstruct, delay, or affect commerce' (other than through robbery or extortion)," Pet. App. 8a, is also contrary to this Court's Hobbs Act decisions in *Scheidler v. NOW*, 537 U.S. 393 (2003), ("*Scheidler II*") and *United States v. Enmons*, 410 U.S. 396 (1973). In both cases, the Court took account of the fact that the defendants had "threaten[ed] or committ[ed] physical vio-

lence in furtherance of a plan to 'obstruct, delay, or affect commerce.'" Yet, in each case, the Court held that a Hobbs Act violation had not been established because the conduct in question did not involve "robbery or extortion," as those terms are defined in the Hobbs Act.

Scheidler II addressed the plaintiffs' claim that the defendants had "committed extortion under the Hobbs Act by using or threatening to use force, violence, or fear to cause [the plaintiffs] to give up property rights, namely, a woman's right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical service free from wrongful threats, violence, coercion and fear." 537 U.S. at 401 (quotation marks omitted).

In rejecting the plaintiffs' interference-with-property-rights claim, the Court observed that "[e]liminating the requirement that property must be obtained to constitute extortion would . . . eliminate the recognized distinction between extortion and the separate crime of coercion." 537 U.S. at 405. In this regard, the Court explained that "[t]he crime of coercion, which more accurately describes the nature of [the defendants'] actions, involves the use of force or threat of force to restrict another's freedom of action." *Ibid.* That being so, in light of "Congress' decision to include extortion as a violation of the Hobbs Act and omit coercion," *id.* at 406, the Court refused to construe "the crime of extortion as set forth in the Act" in a manner that "abandoned" the "distinction between extortion and coercion" and thereby worked "a significant expansion of the law's coverage," *id.* at 409, to reach conduct that does not involve obtaining property but does involve the use of force to interfere with another's exercise of property rights.

The reasoning of *Scheidler II* leaves no room for the Seventh Circuit's expansion of the Hobbs Act's third clause in disregard of the statutory language limiting the reach of

that clause to physical violence in furtherance of a plan to affect commerce by "robbery or extortion."

Enmons involved a Hobbs Act "indictment charg[ing] that the [defendants] had conspired to use and did in fact use violence to obtain for . . . striking employees higher wages and other employment benefits from the [struck utility] Company." 410 U.S. at 398. In sustaining the dismissal of that indictment, the *Enmons* Court rejected "the theory that the [Hobbs] Act proscribes the use of force to achieve legitimate collective-bargaining demands." *Id.* at 407.

There is no question that the use of violence in support of a strike against a public utility could be fairly characterized as engaging in "physical violence in furtherance of a plan to 'obstruct, delay, or affect commerce.'" Yet, because "there ha[d] been no 'wrongful' taking of the employer's property," the *Enmons* Court held that a Hobbs Act violation had not been made out. 410 U.S. at 400. Again, the Court's reasoning leaves no room for the Seventh Circuit's expansion of the Hobbs Act's third clause.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

JONATHAN P. HIATT
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

(8) (6)

Nos. 04-1244, 04-1352

Supreme Court, U.S.
FILED
AUG 26 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONERS

CLARKE D. FORSYTHE
(*Counsel of Record*)
DENISE M. BURKE
MAILEE R. SMITH
AMERICANS UNITED FOR LIFE
310 South Peoria Street,
Suite 300
Chicago, Illinois 60607
312/492-7234

G. ROBERT BLAKEY
O'Neill Professor of Law
NOTRE DAME LAW SCHOOL*
326 Law School
P.O. Box R
Notre Dame, Indiana 46556
574/631-5717

Counsel for Amicus Curiae

August 26, 2005

*Noted for purpose of identification only.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The duty of the Seventh Circuit to enforce the mandate of the Supreme Court is clear	4
II. The Seventh Circuit failed to abide by the letter and spirit of this Court's mandate in *NOW II*	8
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 7

Amoco Prod. Co. v. Vill. of Gambel, 480 U.S. 531 (1987) 11

Bethea v. Levi Strauss & Co., 916 F.2d 453 (8th Cir. 1990) 5

Briggs v. Penn. R.R. Co., 334 U.S. 304 (1948) 4

Casey v. Planned Parenthood, 14 F.3d 848 (3rd Cir. 1994) 5, 6

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988) 4, 6

Eastern Cherokees v. United States, 225 U.S. 572 (1912) 5

Estate of Centennial Communications, Inc. v. Vogelei, 2005 U.S. App. LEXIS 9051 (9th Cir. May 18, 2005) 5

Estate of Leonard E. Whitlock v. Comm'r of Internal Revenue, 547 F.2d 506 (10th Cir. 1976) 5

FCC v. Pottsville Broad. Co., 309 U.S. 134 (1940) 5

Gertz v. Robert Welch, Inc., 680 F.2d 527 (7th Cir. 1982) 7

Hartford Accident & Indem. Co. v. Gulf Ins. Co., 837 F.2d 767 (7th Cir. 1988) 5

In re Sanford Fork & Tool Co., 160 U.S. 247 (1895) ..... *passim*

Kerman v. City of New York, 374 F.3d 93 (2nd Cir. 2004) 5

Moore v. Anderson, 222 F.3d 280 (7th Cir. 2000) 7

TABLE OF AUTHORITIES – Continued

Page

Nat'l Org. for Women, Inc. v. Scheidler, 1999 U.S. Dist. LEXIS 11980 (N.D. Ill. July 28, 1999) 3, 10

Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 1215 (1994) 1

Nat'l Org. for Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) 3, 10

Nat'l Org. for Women, Inc. v. Scheidler, 2004 U.S. App. LEXIS 4020 (7th Cir. Feb. 26, 2004) 3, 11

Nat'l Org. for Women, Inc. v. Scheidler, 396 F.3d 807 (7th Cir. 2005) 3, 8, 11, 12

Pastore v. Structure Guard Inc., 2003 U.S. App. LEXIS 2352 (Fed. Cir. Feb. 5, 2003) 5

Quern v. Jordan, 440 U.S. 332 (1979) 2, 5, 6

Rogers v. Hill, 289 U.S. 582 (1933) 6, 9

Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003) ..... *passim*

Sibbald v. United States, 37 U.S. 488 (1838) 5

Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) ... 2, 4, 5

Tollett v. City of Kemah, 285 F.3d 357 (5th Cir. 2002) 5, 6

United States v. Belculfine, 527 F.2d 941 (1st Cir. 1975) 5

United States v. Camou, 184 U.S. 572 (1902) 6

United States v. Kellington, 217 F.3d 1084 (9th Cir. 2000) 5, 6

United States v. King, 1995 U.S. App. LEXIS 28820 (4th Cir. Oct. 16, 1995) 5

TABLE OF AUTHORITIES – Continued

Page

United States v. LaSalle, 1992 U.S. App. LEXIS 32089 (6th Cir. Nov. 24, 1992) 5

United States v. White, 406 F.3d 827 (7th Cir. 2005) 7

Univ. of Tex. v. Camenisch, 451 U.S. 390 (1981) 11

Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425 (1978) 5, 7

Venn v. St. Paul Fire & Marine Ins. Co., 99 F.3d 1058 (11th Cir. 1996) 5

Vidimos, Inc. v. Wysong Laser Co., Inc., 179 F.3d 1063 (7th Cir. 1999) 2, 7, 13

OTHER AUTHORITIES

Merits Brief of Respondents, *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) 12

Petitioner's Reply to Brief in Opp., *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) 12

Respondents' Brief in Opp. to Petition for Writ, *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) 12

INTEREST OF AMICUS[1]

Americans United for Life (AUL) is a national, non-profit public interest legal and educational organization that advocates, among other things, that the practice of human abortion harms the physical and social well-being of women, ends the lives of the unborn children, and contradicts the highest moral standards of American life. While working primarily in the courts, legislatures, and outlets of public education and media, AUL believes that free, open, and robust public social debate on the issue of abortion must be allowed unimpeded by fear of meritless and costly litigation and the threat of draconian damage awards.

Respondents have been working for nearly twenty years to stifle public opposition to abortion by enjoining free and vigorous protest. If the Court upholds the Seventh Circuit's deviation from this Court's clear mandate which reversed the lower court and injunction, it will not only encourage the stifling of First Amendment rights, but it will also set a disastrous precedent that other Circuits are sure to follow. Both parties and courts will begin speculating whether the Court really means what it says. This will encourage lower federal and state courts to ignore the Supreme Court's decisions, resulting in an unstable judicial system.

---

[1] The parties have agreed to consent to all *amici* who wish to file in this case. Letters to that effect are on file with the Court. Attorneys from Americans United for Life (AUL) previously represented the Petitioners in this litigation. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 1215 (1994). No current counsel for a party authored this brief in whole or in part. No entities other than the *Amicus* or its counsel have made a monetary contribution to the preparation or submission of this Brief.

In addition, AUL's efforts to promote public policy that defends human life by impacting the broader culture will be, at the very least, indirectly and adversely affected. Consequently, AUL files this amicus brief in support of Petitioners, urging that the lower court's decision be summarily reversed.

SUMMARY OF ARGUMENT

Based upon the law of the case doctrine and the mandate rule, the Seventh Circuit has a duty to execute and enforce the Supreme Court's mandates. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). Lower courts cannot vary from, review, or intermeddle with this Court's mandates; instead, the lower courts are to act consistently with the letter and spirit of the Court's mandates. *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979); *Sanford*, 160 U.S. at 255. Even the Seventh Circuit itself has stated that arguments not based upon intervening authority, new evidence, or other changed circumstances are barred by the law of the case doctrine. *Vidimos, Inc. v. Wysong Laser Co., Inc.*, 179 F.3d 1063, 1065 (7th Cir. 1999). In addition, considerations of fact or law that were available when a previous appeal was heard are also barred. *Id.*

In its decision below, the Seventh Circuit failed to abide by the letter and spirit of this Court's mandate by indicating that four predicate acts remain that may justify an injunction. Yet the Court's unequivocal language in *Scheidler v. National Organization for Women, Inc.* [hereinafter "NOW II"] stated that all of the predicate acts alleged of Petitioners must be reversed and that the

injunction imposed against Petitioners must be vacated. 537 U.S. 393, 411 (2003).[2] In addition, the spirit of the mandate also demonstrates that the Supreme Court ruled upon and had before it every predicate act alleged of Petitioners – including the four predicate acts now alleged by Respondents. As such, the Seventh Circuit has deviated from this Court's clear mandate, and the decision of the lower court should be summarily reversed.

ARGUMENT

Respondents initiated this case nearly twenty years ago, and the case has already been before the Supreme Court on two previous occasions. Yet despite the fact that the Court ruled in 2003 that the nationwide injunction entered against Petitioners *must* be *vacated*, this case is once again before the Court. In its *Denial of Rehearing* on remand, the Seventh Circuit made two conclusions: 1) that this Court did not rule on the question of whether four predicate acts involving acts or threats of physical violence[3] could support a more narrow injunction, and 2) that this Court did not even have before it those four predicate acts. *Denial of Rehearing*, 396 F.3d at 811. Based upon the

[2] For ease of reference, the following additional decisions, listed in chronological order, will be referenced and cited by the caption noted: *Nat'l Org. for Women, Inc. v. Scheidler*, 1999 U.S. Dist. LEXIS 11980 (N.D. Ill. July 28, 1999) [hereinafter "*District Court Order*"]; *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001) [hereinafter "*Decision Affirming Judgment*"]; *Nat'l Org. for Women, Inc. v. Scheidler*, 2004 U.S. App. LEXIS 4020 (7th Cir. Feb. 26, 2004) [hereinafter "*Initial Order on Remand*"]; *Nat'l Org. for Women, Inc. v. Scheidler*, 396 F.3d 807 (7th Cir. 2005) [hereinafter "*Denial of Rehearing*"].

[3] Hereinafter "four predicate acts."

law of the case doctrine and the mandate rule, the Seventh Circuit deviated from this Court's mandate in *NOW II*.

I. THE DUTY OF THE SEVENTH CIRCUIT TO ENFORCE THE MANDATE OF THE SUPREME COURT IS CLEAR

According to the "law of the case" doctrine, once a court decides upon a rule of law, that decision governs the same issues in subsequent stages of the same case. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988). A corollary of this doctrine is the mandate rule, which holds that a lower court is "bound to carry the mandate of the upper court into execution and [cannot] consider the questions which the mandate laid at rest." *Sprague*, 307 U.S. at 168.

Even in its "earliest days," this Court consistently held that a lower court has no authority to deviate from the mandate issued by an appellate court. *Briggs v. Penn. R.R. Co.*, 334 U.S. 304, 306 (1948). Indeed, in 1895 this Court held the following in *In re Sanford Fork & Tool Co.*:

> When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

160 U.S. at 255 (citing *Sibbald v. United States*, 37 U.S. 488, 492 (1838)). *Sanford* is still considered the "seminal case" on the law of the case doctrine and the mandate rule, and this Court as well as each of the circuit courts continue to abide by its stated principles.[4] *United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir. 2000) (stating that *Sanford* is the "seminal case" on the subject of the mandate rule).

According to *Sanford*, the opinions delivered by this Court are to be consulted to ascertain what was intended in the Court's mandate. *Sanford*, 160 U.S. at 256. As

---

[4] *See, e.g., Quern*, 440 U.S. at 347 n.18 (citing *Sanford*); *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978) (quoting *Sanford*); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 140 (1940) (declaring that the rule set out in *Sanford* is "familiar" and "indisputable"); *Sprague*, 307 U.S. at 168 (citing *Sanford* and stating that the requirement to carry out a higher court's mandate is "indisputable"); *Eastern Cherokees v. United States*, 225 U.S. 572, 582 (1912) (stating that the courts are bound to give effect to the rule in *Sanford*); *see also United States v. Belculfine*, 527 F.2d 941, 943 (1st Cir. 1975) (citing *Sanford*); *Kerman v. City of New York*, 374 F.3d 93, 110 (2nd Cir. 2004) (citing *Sanford*); *Casey v. Planned Parenthood*, 14 F.3d 848, 857 (3rd Cir. 1994) (stating that the rule in *Sanford* has remained unchanged in nearly one hundred fifty years); *United States v. King*, 1995 U.S. App. LEXIS 28820, *5 (4th Cir. Oct. 16, 1995) (citing *Sanford*); *Tollett v. City of Kemah*, 285 F.3d 357, 364 (5th Cir. 2002) (citing *Sanford*); *United States v. LaSalle*, 1992 U.S. App. LEXIS 32089, *3 (6th Cir. Nov. 24, 1992) (citing *Sanford*); *Hartford Accident & Indem. Co. v. Gulf Ins. Co.*, 837 F.2d 767, 774 (7th Cir. 1988) (quoting *Sanford*); *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990) (citing *Sanford*); *Estate of Centennial Communications, Inc. v. Vogelei*, 2005 U.S. App. LEXIS 9051, *3 (9th Cir. May 18, 2005) (quoting *Sanford*); *Estate of Leonard E. Whitlock v. Comm'r of Internal Revenue*, 547 F.2d 506, 509-10 (10th Cir. 1976) (citing *Sanford*); *Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058, 1062 (11th Cir. 1996) (citing *Sanford*); *Pastore v. Structure Guard Inc.*, 2003 U.S. App. LEXIS 2352, **3-4 (Fed. Cir. Feb. 5, 2003) (citing *Sanford*).

stated in later decisions, a lower court must act consistently with the "letter and spirit" of the Court's mandate. *See, e.g., Quern*, 440 U.S. at 347 n.18 (discussing that a lower court's actions cannot be inconsistent with either the spirit or the express terms of the Court's mandate); *Kellington*, 217 F.3d at 1093 ("[I]n construing a mandate, the lower court may consider the opinion the mandate purports to enforce as well as the procedural posture and substantive law from which it arises."); *Tollett*, 285 F.3d at 364 (stating that the mandate rule provides that a lower court must implement both the letter and spirit of an appellate court's mandate); *Casey*, 14 F.3d at 863 (stating that the Supreme Court's mandate required the district court to implement both the letter and spirit of the Court's mandate).[5]

In other words, a lower court is to look not only to the express language in the Court's mandate, but also to the Court's intent. The purpose of this rule is to promote the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." *Christianson*, 486 U.S. at 816.[6] Ultimately, the Court in *Sanford* concluded, "It must be remembered . . . that no question, once considered

[5] *See also Rogers v. Hill*, 289 U.S. 582, 587 (1933) (stating that a direction for proceedings in accordance with the Court's "opinion" makes the opinion – as opposed to the "judgment" alone – part of the mandate); *Casey*, 14 F.3d at 859 ("[W]here the appellate court directs the [lower] court to act in accordance with the appellate opinion, . . . the opinion becomes part of the mandate and must be considered with it.") (citation and internal quotation marks omitted).

[6] *See also Christianson*, 486 U.S. at 816 n.5 ("Perpetual litigation of any issue . . . delays, and therefore threatens to deny, justice."); *United States v. Camou*, 184 U.S. 572, 574 (1902) ("[T]here would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions. . . .").

and decided by this court, can be reexamined at any subsequent stage of the same case." *Sanford*, 160 U.S. at 259.

The Seventh Circuit has repeatedly recognized the law of the case doctrine and the mandate rule.[7] Earlier this year, the Circuit stated that the law of the case doctrine and the mandate rule require a lower court to adhere to the commands of this Court. *United States v. White*, 406 F.3d 827, 831 (7th Cir. 2005); *see also Moore v. Anderson*, 222 F.3d 280, 283 (7th Cir. 2000) (acknowledging the Seventh Circuit's reliance on the law of the case doctrine). In fact, the Circuit has held that the *duty* of the inferior courts to enforce the mandates of the Supreme Court is *clear*. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 532 (7th Cir. 1982). Furthermore, the Circuit has declared that the following arguments are barred by the law of the case doctrine: 1) arguments for reconsideration not based upon intervening authority, new and previously undiscoverable evidence, or other changed circumstances; and 2) considerations of fact or law that were available when the previous appeal was argued. *Vidimos*, 179 F.3d at 1065 (citing, among other case law, *Agostini v. Felton*, 521 U.S. 203, 236 (1997)).

Based upon this long line of prior case law, the Seventh Circuit had a *duty* to follow this Court's mandate strictly, taking both the letter and spirit of the mandate

[7] Yet this is not the first time the Northern District of Illinois and the Seventh Circuit have been implicated in failing to abide by a mandate of this Court. *See Vendo*, 434 U.S. at 425-27 (addressing the district court's failure to vacate an injunction, despite the Supreme Court's prior holding that the injunction be reversed).

into consideration. The Seventh Circuit inexcusably deviated from the Court's mandate.

II. THE SEVENTH CIRCUIT FAILED TO ABIDE BY THE LETTER AND SPIRIT OF THIS COURT'S MANDATE IN *NOW II*

On January 28, 2005, the Seventh Circuit held the following:

> The [Supreme] Court did not have before it, and thus made no ruling on, the question whether four more predicate acts involving "acts or threats of physical violence to any person or property" could support a more narrow injunction.

Denial of Rehearing, 396 F.3d at 811. Thus, the Circuit concluded, the only remaining question was whether a different injunction, tailored to the violations found, would be appropriate. *Id.* at 812. The express terms and the spirit of this Court's mandate in *NOW II* dictate differently.

In *NOW II*, the Court concluded that its determination with respect to extortion under the Hobbs Act violations rendered insufficient "the other bases or predicate acts of racketeering" supporting the jury's conclusion. *NOW II*, 537 U.S. at 397. In other words, all of the predicate actions – including the four predicate acts – were insufficient to support the jury's conclusion. The Court then explicitly held the following:

> Because *all of the predicate acts* supporting the jury's finding of a RICO violation *must be reversed*, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the *injunction* issued by the District Court *must necessarily be vacated*. We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964.

NOW II, 537 U.S. at 411 (emphasis added). Thus, the express terms of the Court's mandate dictated that *all* of the predicate acts and the *injunction* be *reversed*. Nevertheless, the Seventh Circuit ruled that four predicate acts *remain* and an injunction *may still be maintainable*. This is in direct conflict with the express terms – the "letter" – of this Court's mandate.

In essence, the Seventh Circuit indicated that this Court did not mean "all" when it said "all." Yet a lower court is simply not free to second-guess or disagree with this Court's reasoning or mandate. *See Sanford*, 160 U.S. at 255 (stating that a lower court may not review the Court's mandate even for apparent error). As the Court stated in *Rogers*, if the Court intended to direct a certain action, "it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose." *Rogers*, 289 U.S. at 587. Here, the Court unequivocally stated "all" and declared that the injunction "must necessarily be vacated." This form of decree and mandate could not be more direct.

Furthermore, the Court's intent – the "spirit" of the mandate – is just as clear and has been equally ignored and contradicted by the Seventh Circuit. This Court acknowledged that it granted certiorari to answer the following questions: 1) whether Petitioners committed extortion within the meaning of the Hobbs Act, and 2) whether Respondents, as private litigants, may obtain

injunctive relief in a civil action pursuant to RICO. *NOW II*, 537 U.S. at 397. The most obvious example of the Court's intent – outside of its unequivocal language – is found in its decision not to address the second question of whether a private plaintiff in a civil RICO action is entitled to injunctive relief. *Id.* If the Court intended the alleged four predicate acts to remain open, it could not have passed on this question, as there would have been an underlying RICO violation. Rather, the Court meant what it said: *no* predicate acts remained, and therefore the question of private injunctions need not be addressed.

In addition, the four predicate acts were indeed within the scope of the questions presented on certiorari. Most telling is the fact that the four predicate acts were included in the injunction the Court reversed. Specifically, the District Court declared that the Defendants were enjoined from directly or indirectly interfering with the Respondents' businesses by "using violence or threat of violence" against any of the Respondents. *District Court Order*, 1999 U.S. Dist. LEXIS 11980, at **60-61. Both this Court as well as the Circuit Court acknowledged that the injunction enjoined such acts or threats of violence. *NOW II*, 537 U.S. at 399 ("[T]he District Court entered a permanent nationwide injunction prohibiting petitioners from . . . using violence or threats of violence. . . ."); *Decision Affirming Judgment*, 267 F.3d at 695, 706 (noting that the District Court entered a nationwide injunction prohibiting the use or threat of violence). In fact, the Circuit Court acknowledged that the purpose of the injunction was to direct Defendants away from using threats and violence. *Decision Affirming Judgment*, 267 F.3d at 707.

As the four predicate acts were explicitly included in the District Court's injunction, and because the injunction

was before the Court on certiorari, it follows that this Court had those predicate acts before it when it reversed the injunction. Thus, the four predicate acts were within the scope of the Court's mandate.

The four predicate acts also fall specifically under the first question presented in *NOW II*. While the Seventh Circuit assumed that the four predicate acts were not before the Court because those acts were not explicitly enumerated in the petitions for certiorari, that assumption is flawed.[8] *Denial of Rehearing*, 396 F.3d at 812; *Initial Order on Remand*, 2004 U.S. App. LEXIS 4020, at **6-9. According to the Circuit's reasoning, neither the state law extortion claims nor the Travel Act claims were before the Court because neither were explicitly enumerated in the Supreme Court's grant of certiorari – but because those claims depended entirely on the Court's resolution of the extortion claims for which the Court had granted certiorari, the Court ruled upon their validity. *See NOW II*, 537 U.S. at 409-11.

Likewise, the four predicate acts were also included within the first question presented.[9] The Court granted certiorari in *NOW II* to answer whether the Petitioners committed extortion within the meaning of the Hobbs Act,

---

[8] Even if this assertion was correct, the Circuit Court ignored the fact that Respondents are not prevailing parties, and a permanent injunction can only issue when a party actually prevails on the merits. *See, e.g., Amoco Prod. Co. v. Vill. of Gambel*, 480 U.S. 531, 546 n.12 (1987) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 392 (1981)).

[9] *See Denial of Rehearing*, 396 F.3d at 820 (Manion, J., dissenting) ("[T]he four predicate acts of violence to persons or property depend on the viability of the extortion claims in this case. By holding that the [Petitioners] did not commit extortion, it necessarily follows that the four predicate acts also cannot support a RICO verdict.").

and the Respondents have acknowledged that the four predicate acts were based upon the Hobbs Act. *Id.* at 397; *Denial of Rehearing*, 396 F.3d at 818 n.1 (Manion, J., dissenting). When this Court ruled that Petitioners did not commit extortion under the Hobbs Act, it necessarily ruled on those four predicate acts.

Moreover, the parties' arguments before this Court in *NOW II* indicated that the four predicate acts were before the Court. While Respondents did mention in the petition stage that there were four predicate acts independent of extortion, Petitioners countered that argument by stating that they challenged each and every predicate act. *See* Respondents' Brief in Opp. to Petition for Writ at 5, 5 n.14, 15, *NOW II*, 537 U.S. 393 (2003); Petitioner's Reply to Brief in Opp. at 7, 7 n.13, *NOW II*, 537 U.S. 393 (2003). Subsequently, when the parties briefed the merits of the case, Respondents dropped this argument. In fact, in answering the Petitioners' briefs, Respondents specifically referred to 121 RICO predicates – not the 117 now alleged – which necessarily demonstrates that the RICO predicates before the Court included the four predicate acts. *See* Merits Brief of Respondents at 1, 3, 3 n.4, *NOW II*, 537 U.S. 393 (2003). Because the Respondents did not counter Petitioners' claims that all of the predicate acts were before the Court, and because the Respondents apparently included the four predicate acts in the 121 predicates to which they referred, the Court had no reason to explicitly address the four predicate acts now allegedly at issue.

For each of these reasons, the four predicate acts were before the Court and the Court ruled – both in letter and spirit – that the injunction be reversed even as to these four predicate acts. Instead of executing that mandate, the Circuit failed to treat the Court's decision on the four

predicate acts as "finally settled," varied the mandate, examined the mandate for purposes other than execution, and intermeddled with the mandate. *See Sanford*, 160 U.S. at 255. Interestingly, the Seventh Circuit's actions violated its own case law. The Respondents' arguments are not based upon intervening authority, new and previously undiscoverable evidence, or other changed circumstances.[10] *See Vidimos*, 179 F.3d at 1065. Instead, the Circuit considered law and facts which were available when *NOW II* was argued – which is exactly the type of review the Circuit declares barred by the law of the case doctrine. *See id.*

In summary, not only were the four predicate acts before this Court in *NOW II*, but this Court ruled upon those acts and concluded that the injunction prohibiting those acts must be reversed. As such, the Seventh Circuit deviated from both the letter and spirit of this Court's mandate. Therefore, the judgment of the lower court should be summarily reversed.

---

[10] These are exceptions to the law of the case doctrine generally allowed by the federal courts. Neither the Respondents nor the Seventh Circuit contend that any of these exceptions apply.

CONCLUSION

The judgment of the lower court should be summarily reversed.

Respectfully submitted,

CLARKE D. FORSYTHE
(*Counsel of Record*)
DENISE M. BURKE
MAILEE R. SMITH
AMERICANS UNITED FOR LIFE
310 South Peoria Street,
Suite 300
Chicago, Illinois 60607
312/492-7234

G. ROBERT BLAKEY
O'Neill Professor of Law
NOTRE DAME LAW SCHOOL*
326 Law School
P.O. Box R
Notre Dame, Indiana 46556
574/631-5717

Counsel for Amicus Curiae

August 26, 2005

*Noted for purpose of identification only.

Supreme Court, U.S.
FILED
MAY 11 2005
OFFICE OF THE CLERK

(6) (5)

Nos.04-1244 and 04-1352

IN THE

Supreme Court of the United States

04-1244

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

04-1352

OPERATION RESCUE,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS

THERESA SCHREMPP*
SONKIN & SCHREMPP, PLLCC
2955 80TH Avenue SE
Suite 201
Mercer Island, WA 98040
(206) 275-2878

Attorneys for Amicus Curiae

MARK L. LORBIECKI
BLACK LOWE & GRAHAM PLLC
701 Fifth Avenue, 48th Floor
Seattle, WA 98104
(206) 903-1800

*Counsel of Record

QUESTION PRESENTED

Did the Seventh Circuit err in ruling that the Hobbs Act, 18 U.S.C. §1951, might apply to threats or acts of violence which affect interstate commerce, but which are unrelated to robbery or extortion?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE PLAIN LANGUAGE OF THE HOBBS ACT INDICATES THAT IT DOES NOT APPLY TO ACTS OR THREATS OF VIOLENCE THAT ARE UNRELATED TO ROBBERY OR EXTORTION. 4

II. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT IS CONTRADICTED BY THE HOBBS ACT'S LEGISLATIVE HISTORY 6

III. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT IS ALSO INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE RICO AND FACE STATUTES 9

A. The Legislative History of the RICO Statute Militates Against the Seventh Circuit's Interpretation 9

B. The Legislative History of the FACE Statute Militates Against the Seventh Circuit's Interpretation. . 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Cleveland v. United States, 531 U.S. 12, 25 (2000) 12

Dowling v. United States, 473 U.S. 207 (1985) 12

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475, (1992) 6

Pasquatino v. United States, 73 U.S.L.W. 4287, 4290 n.4 (U.S. Apr. 26, 2005) (No. 03-725) 6

Russello v. United States, 464 U.S. 16, 21 (1983) 4

United States v. Bass, 404 U.S. 336, 348, (1971) 12

United States v. Enmons, 410 U.S. 396, 402 (1973) 8, 12

United States v. Teamsters, 315 U.S. 521 (1942) 8

United States v. Turkette, 452 U.S. 576, 580 (1981) 4

Statutes

18 U.S.C. § 1951 (a) 4

18 U.S.C. §1951 ..... passim

18 U.S.C. §1961 ..... passim

18 U.S.C. §248. ..... 3, 11

48 Stat. 979, ch. 569 ..... 5, 7

Other Authorities

103rd Cong. 1st Sess. P. 8 (May 12, 1993)..... 11

91 Cong. Rec. 11848 (1945)..... 8

91 Cong. Rec. 11900..... 8

S. 2248, 73rd Cong. Sec. 2 (1) (1934). (reprinted at 78 Cong. Rec. 5734)..... 7

Treatises

Note, 75 Notre Dame L. Rev. 691, 697-698..... 10

BRIEF FOR THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS JOSEPH SCHEIDLER *ET AL.*

INTEREST OF THE AMICUS

Concerned Women for America ("CWA") has 500,000 members in all 50 states and is the largest public policy women's organization in the United States. CWA encourages policies that strengthen families, and advocates the traditional virtues that are central to America's cultural health and welfare.

CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Therefore, CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, organization, and assembly protected by the First Amendment. CWA believes that the decision of the lower court poses a significant threat to those rights.1

In the decision below, the Seventh Circuit made the unprecedented ruling that violent acts or the threat of violent acts violate the Hobbs Act, even if such acts are unrelated to

---

1 Pursuant to Rule 37.6 of this Court, no counsel for a party authored this brief in whole or in part, and no person or entity other than CWA and their counsel made any monetary contribution to the preparation or submission of this brief. Counsel for Petitioners Joseph Scheidler, *et al.* in No. 04-1244, counsel for Petitioner Operation Rescue in No. 04-1352, and counsel for Respondents in both cases have each consented to the filing of this amicus brief. The written consent of each counsel accompanies this brief.

robbery or burglary. This dangerously expansive definition of the Hobbs Act violates the plain wording of the statute. The holding threatens free speech by requiring federal courts to mete out draconian punishment, pursuant to the Hobbs Act and RICO, against political protestors who engage in even minor threats or acts of violence. Such actions are already illegal under state law and should be dealt with by the state, not the federal, courts.

STATEMENT

The Hobbs Act criminalizes three activities: (1) extortion (including attempts or conspiracies to commit extortion); (2) robbery (including attempts or conspiracies to commit robbery); and (3) acts or threats of violence "in furtherance of a plan or purpose to do anything in violation of this section." The Seventh Circuit, in an alarming effort to keep this case alive and in direct contradiction to the holding of this Court, has resorted to re-writing the third option to eliminate the explicit requirement that the prohibited violence must be "in furtherance" of a violation of this section, i. e., in furtherance of either robbery or extortion.

The Seventh Circuit disregards the explicit requirement that violence or threats of violence give rise to liability under the Hobbs Act only when they are "in furtherance of" robbery or extortion. Under the Seventh Circuit's interpretation, any free standing act or threat of violence, however unconnected to the crimes of extortion or robbery, becomes a Hobbs Act violation if the act affects commerce. The Seventh Circuit's re-writing of the Hobbs Act transforms the statute from one that was enacted to penalize crimes of acquisition to one that criminalizes all manner of violence and threats of violence,

regardless of whether the perpetrator intended to acquire property. Both robbery and extortion are property crimes of wrongful acquisition where physical force or fear of physical force is used. Under the Seventh Circuit's ruling, all violent acts and threats which affect interstate commerce become "predicate acts" under the RICO statute, 18 U.S.C. sec. 1961, which lists violations of the Hobbs Act (18 U.S.C. §1951) as racketeering acts.

As the instant case graphically illustrates, the expanded definition of the Hobbs Act (and thus the RICO statute) creates a crushing political weapon in the hands of those such as the Respondents, who strive to stifle the voices of those with whom they disagree.

SUMMARY OF ARGUMENT

The decision of the Seventh Circuit misconstrues the plain language of the Hobbs Act. The language of the Hobbs Act is unambiguous and does not cover violent actions unconnected with extortion or robbery. Even assuming, for arguments sake, that the language is ambiguous (which it is not) the expanded interpretation urged by the Seventh Circuit is inconsistent with the legislative history of the Hobbs Act, the RICO statute and the FACE statute, and violates the rule of lenity.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE HOBBS ACT INDICATES THAT IT DOES NOT APPLY TO ACTS OR THREATS OF VIOLENCE THAT ARE UNRELATED TO ROBBERY OR EXTORTION.

It is a fundamental rule of interpreting statutes to begin with the text of the statute. *United States v. Turkette,* 452 U.S. 576, 580 (1981). Words are to be given their ordinary meaning. *Russello v. United States*, 464 U.S. 16, 21 (1983).

The Hobbs Act, 18 U.S.C. § 1951 (a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property ~~in furtherance of a plan or purpose to do~~ *anything in violation of this section*, shall be fined under this title or imprisoned not more than twenty years, or both.

One can violate the Hobbs Act by 1) robbery; 2) extortion and threats or conspiracies to commit extortion; or 3) threatening or committing violence in furtherance of a violation of this section; i.e., in furtherance of robbery or extortion.

The Seventh Circuit expands the definition of the Hobbs Act by blatantly ignoring the fifteen words, italicized above, which limit and modify the violent acts or threats that comprise the third option for a Hobbs Act violation. Had Congress intended to federalize prosecution for acts of violence and threats of violence affecting commerce, there would have been no need

for those fifteen words, and they would not have been included. It would be odd and redundant for Congress to combine with those crimes the general offense of violent acts property interests. Every robbery involves a threat of violence against people or property along with the element of a taking and carrying away of personal property. As such, the Seventh Circuit's interpretation of the statute renders the robbery offense superfluous. The statutory construction urged by the Seventh Circuit makes sense only if those italicized 15 words are ignored.

In its ruling, the Seventh Circuit argues against the plain meaning of the statute by noting that, the "physical violence" clause of 18 U.S.C. §1951 (a) would, in many or most cases, define activity already prohibited by the "attempt" or conspiracy prohibitions of the statute. If there is a redundancy between the "physical violence" clause and other prohibitions in the statute, the redundancy undoubtedly exists because Congress intended to avoid any potential and unforeseen loopholes through which an extortionist, robber, or "assistant" could slip. Other redundancy certainly exists within this statute. The term "obstructs, delays, or affects commerce" could probably have been edited to "affects commerce" without any change in the scope of the Act. The terms "article" and "commodity" are redundant because all commodities are articles. The terms "affects commerce" and "the movement of any article or commodity in commerce" are duplicative.

It is apparent that Congress, in defining the Hobbs Act offenses, used definitions that to some degree overlapped, to prohibit certain conduct relating to extortion and robbery. After all, the Hobbs Act and its predecessor, the 1934 Federal

Anti-Racketeering Act, were enacted to address the problem of organized crime, which often involves participation by numerous individuals at many levels. Given the nearly limitless possible scenarios for participation in the crimes of robbery and extortion, it is entirely reasonable that Congress engaged in a bit of verbal superfluity in order to assure that every base was covered. As this Court recently explained: "Any overlap . . . is beside the point. The Federal Criminal Code is replete with provisions that criminalize overlapping conduct." *Pasquatino v. United States*, 73 U.S.L.W. 4287, 4290 n.4 (U.S. Apr. 26, 2005) (No. 03-725).

II. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT IS CONTRADICTED BY THE HOBBS ACT'S LEGISLATIVE HISTORY.

The Hobbs Act is unambiguous on its face. Therefore, no further judicial inquiry as to its meaning is necessary or appropriate, and the Court need not and should not resort to an analysis of legislative history or to principles of statutory construction. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, (1992). ("When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.")

However, even assuming—but not conceding—that the "physical violence" clause of the Hobbs Act is ambiguous on its face and susceptible to the interpretation set forth by the Seventh Circuit, the legislative history of the Hobbs Act demonstrates that Congress did not intend the statute to apply to acts and threats of violence absent a connection to extortion

or robbery.

Any analysis of the Hobbs Act must begin with an analysis of the Act's predecessor, the Federal Anti-Racketeering Act of 1934, 48 Stat. 979, ch. 569, which the Hobbs Act subsequently amended. The original language of the 1934 bill provided that it was a crime to commit or threaten to commit "any act of violence. . .to a person or property" in "connection with or in relation to any act in any way. . .affecting. . .commerce." S. 2248, 73rd Cong. Sec. 2 (1) (1934). (reprinted at 78 Cong. Rec. 5734). After representatives of organized labor expressed concern regarding the breadth of the language, the measure was amended to limit the proscribed activity to robbery, extortion and violence in furtherance of robbery and extortion.2 Clearly, the 1934 Act did not cover freestanding acts or threats of violence unconnected to the crimes of extortion and robbery.

---

2 The Anti-Racketeering Act of 1934 provided in pertinent part:

Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trace or commerce—(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear. . .;or

(c) Commits or threatens to commit an act of Physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b). . . .

The 1934 Act was subsequently amended by the Hobbs Act for a single reason: Congress was dissatisfied with this Court's decision in *United States v. Teamsters,* 315 U.S. 521 (1942). In *Teamsters,* the Court held that the 1934 Act did not cover the actions of union truck drivers who exacted money by threats or violence from out-of-town drivers in return for undesired services. The Hobbs Act deleted the exception on which the Court relied in *Teamsters* and substituted specific prohibitions against robbery and extortion. *United States v. Enmons*, 410 U.S. 396, 402 (1973). Congressional debates on the Hobbs Act centered on whether the bill was designed as an attack on organized labor. Opponents of the bill argued that it would be used to prosecute strikers. *See, e.g.* 91 Cong. Rec. 11848 (1945) (remarks of Rep. Lane). Supporters of the bill steadfastly maintained that the purpose of the bill was to prohibit robbery and extortion perpetrated by anyone, including labor unions. *See, e. g.* 91 Cong. Rec. 11900 (remarks of Rep. Hancock). No one argued that the Hobbs Act created the entirely new federal crime of violence unconnected to the underlying crimes of robbery or extortion. The resulting 1946 version of the Hobbs Act specifically linked "acts of physical violence" to "robbery" and "extortion." The 1948 revisions to the Hobbs Act were intended to be limited to formal and stylistic changes.

This Court has consistently held that it should not too readily interpret federal statutes in a manner that would insert federal jurisdiction in an area traditionally reserved to the states. As noted in *United States v. Enmons*, 410 U.S. 396, 411 (1973):

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that

> Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

Had Congress intended such a sweeping expansion of the 1934 Act, one would assume that the debate would have at least touched on that issue. It did not. Had Congress intended to extend federal jurisdiction to criminal activity usually reserved to states, it would have used statutory language that explicitly made such provisions. It did not.

III. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT IS ALSO INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE RICO AND FACE STATUTES.

A. The Legislative History of the RICO Statute Militates Against the Seventh Circuit's Interpretation.

In an earlier version of the RICO statute, 18 U.S.C. §1961, racketeering activity was defined as "any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year." Senators Edward M. Kennedy and Philip A. Hart complained that the bill reached beyond "organized crime." The ACLU opposed the measure, because the definition of "racketeering" could have been used against anti-

war demonstrations at the Pentagon and Columbia University and would result in "a large number of unintended applications." As a result of these objections, the broad language contained in the initial bill was replaced with a list of designated federal and state offenses. *See,* Note, 75 Notre Dame L. Rev. 691, 697-698. If the Court accepts the Plaintiff's interpretation of the Hobbs Act as covering even freestanding acts of violence, the result will be that which Congress, when it enacted RICO, intended to avoid. Violent acts and threats unconnected to robbery and extortion will be prosecuted under RICO, by means of an expanded Hobbs Act.

If, as the Seventh Circuit suggests, all acts of violence affecting interstate commerce and threats of violence constitute Hobbs Act violations (and thus RICO violations), then it is strange indeed that Congress specifically enumerated, as racketeering acts, a variety of crimes which are inherently violent, including arson, murder and murder for hire. 18 U.S.C. sec 1961. Had Congress intended the Hobbs Act to apply as a catch-all for all violent crimes, there would have been no need to designate these specific violent crimes as "racketeering acts." The fact that Congress *did* distinguish certain *specific* violent offenses as predicate "racketeering" acts, demonstrates that Congress did not interpret or intend the Hobbs Act (or RICO) to reach all violent conduct.

B. The Legislative History of the FACE Statute Militates Against the Seventh Circuit's Interpretation.

Further evidence that the Seventh Circuit's decision is unsupported by legislative history is found in the 1993 debates

regarding the enactment of the Freedom of Access to Clinic Entrances (FACE) 18 U.S.C. §248.3 Abortion advocates argued that the FACE statute was needed because existing laws (presumably including the Hobbs Act and RICO) were inadequate to protect abortion clinics. During the FACE debates, Attorney General Janet Reno testified that "existing Federal laws, while perhaps applicable in some instances (are) inadequate." Hearing before the Senate Committee on Labor and Human Resources, 103rd Cong. 1st Sess. P. 8 (May 12, 1993). Similar concerns were expressed by Rep. Schumer. Hearings before the House Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, 103 Cong. 1st Sess., p. 1 (April 1 and June 10, 1993).

The fact that Congress enacted FACE to address this perceived inadequacy is a further indication that the Hobbs Act did not contain a catch-all prohibition against violent threats and actions directed against abortion clinics. Notably, FACE violations are not included in the list of RICO predicate acts in 18 U.S.C. sec. 1961. If Congress had intended RICO to address violent protests against abortion clinics, it certainly would have added FACE violations to the list of "racketeering" acts set forth in 18 U.S.C. sec. 1961. It did not.

IV. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT CONTRADICTS THE RULE OF LENITY.

---

3 18 U.S.C. §248 (a) provides criminal and civil penalties for obstructing, injuring, intimidation and interference with persons in connection with reproductive health services.

Assuming *arguendo* that the Seventh Circuit was correct when it stated that the language of the Hobbs Act in question here is susceptible to two interpretations, the basic principle of lenity requires that the narrower construction be adopted. This rule was articulated in *Dowling v. United* States, 473 U.S. 207 (1985), in which the Supreme Court determined that bootleg phonograph records were not "goods" obtained by fraud:

> [W]hen assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogative of Congress in defining federal crime prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate.

Lenity "is especially appropriate in construing [a statute which] is a predicate offense under RICO," as this Court has held. *Cleveland v. United States*, 531 U.S. 12, 25 (2000). For example, this Court applied the rule of lenity to an effort by the government to expand the Hobbs Act to legitimate labor disputes in which violence occurred. *U.S. v. Enmons,* 410 U.S. 396, 411 (1973).

This Court has noted that the rule of lenity is informed by two policies that have long been a part of our tradition. First, a criminal statute requires that fair warning be given or proscribed activity; and, second, the legislature and not the courts should define criminal activity. *United States v. Bass*, 404 U.S. 336, 348, (1971).

The Seventh Circuit's rejection of the rule of lenity is particularly puzzling. The Court, basically, opined that there

was so little at stake regarding the two competing interpretation of the Hobbs Act, that the rule of lenity shouldn't apply. Contrary to the opinion of the Seventh Circuit, application of the rule of lenity has never been limited to circumstances in which the sky is falling. If Congress wanted to federalize all violent crime, it must enact legislation that clearly expresses that intent. It has not. Otherwise, the rule of lenity applies to criminal statutes.

CONCLUSION

This Court should grant certiorari and should reverse the decision of the seventh Circuit.

Respectfully submitted,

Theresa Schrempp
SONKIN & SCHREMPP PLLC
Eightieth Avenue Professional Building
2955 80th Avenue SE, Suite 201
Mercer Island, WA 98040-2960

Mark L. Lorbiecki
BLACK LOWE & GRAHAM PLLC
701 Fifth Avenue, 48th Floor
Seattle, Washington 98104

May 11, 2005

Supreme Court, U.S.
FILED
SEP 2 - 2005
OFFICE OF THE CLERK

Nos.04-~~1244~~ and 04-1352

IN THE

Supreme Court of the United States

04-1244

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

04-1352

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS

THERESA SCHREMPP*
SONKIN & SCHREMPP, PLLCC
2955 80TH Avenue SE
Suite 201
Mercer Island, WA 98040
(206) 275-2878

MARK L. LORBIECKI
BLACK LOWE & GRAHAM PLLC
701 Fifth Avenue, 48th Floor
Seattle, WA 98104
(206) 903-1800

Attorneys for Amicus Curiae

*Counsel of Record

QUESTION PRESENTED

The *amicus curiae* will address the following question:

Whether the Hobbs Act, 18 U.S.C. §1951, applies to threats or acts of violence which affect interstate commerce, but which are unrelated to robbery or extortion?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE PLAIN LANGUAGE OF THE HOBBS ACT INDICATES THAT IT DOES NOT APPLY TO ACTS OR THREATS OF VIOLENCE THAT ARE UNRELATED TO ROBBERY OR EXTORTION 4

II. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT IS CONTRADICTED BY THE HOBBS ACT'S LEGISLATIVE HISTORY. 6

III. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT IS ALSO INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE RICO AND FACE STATUTES. 10

A. The Legislative History of the RICO Statute Militates Against the Seventh Circuit's Interpretation. 10

B. The Legislative History of the FACE Statute Militates Against the Seventh Circuit's Interpretation. 11

IV. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT CONTRADICTS THE RULE OF LENITY. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Cleveland v. United States, 531 U.S. 12, 25 (2000) 14

Dowling v. United States, 473 U.S. 207 (1985) 13

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475, (1992) 7

McNally v. United States, 483 U.S. 350, 359-60 (1987) 14

Russello v. United States, 464 U.S. 16, 21 (1983) 4

United States v. Bass, 404 U.S. 336, 348, (1971) 13

United States v. Enmons, 410 U.S. 396, 402 (1973) ... 8, 9, 14

United States v. Franks, 511 F.2d 25, 31 (1975) 5

United States v. Teamsters, 315 U.S. 521 (1942) 8

United States v. Turkette, 452 U.S. 576, 580 (1981) 4

Statutes

18 U.S.C. § 1951 (a) 4

18 U.S.C. §1951 ..... passim

18 U.S.C. §1961 ..... passim

18 U.S.C. §248. .....3, 12

48 Stat. 979, ch. 569 .....6, 7

Other Authorities

103rd Cong. 1st Sess. P. 8 (May 12, 1993) 12

91 Cong Rec. 11912 (1945).....9

91 Cong. Rec. 11848 (1945).....8

91 Cong. Rec. 11900 (1945).....9

S. 2248, 73rd Cong. Sec. 2 (1) (1934). (reprinted at 78 Cong. Rec. 5734) 7

Treatises

Note, 75 Notre Dame L. Rev. 691, 697-698.....11

BRIEF FOR THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS JOSEPH SCHEIDLER *ET AL.*

INTEREST OF THE AMICUS

Concerned Women for America ("CWA") has 500,000 members in all 50 states and is the largest public policy women's organization in the United States. CWA encourages policies that strengthen families, and advocates the traditional virtues that are central to America's cultural health and welfare.

CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Therefore, CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, organization, and assembly protected by the First Amendment. CWA believes that the decision of the lower court poses a significant threat to those rights.[1]

In the decision below, the Seventh Circuit made the unprecedented ruling that violent acts or the threat of violent acts violate the Hobbs Act, even if such acts are unrelated to

---

1 Pursuant to Rule 37.6 of this Court, no counsel for a party authored this brief in whole or in part, and no person or entity other than CWA and their counsel made any monetary contribution to the preparation or submission of this brief. Counsel for Petitioners Joseph Scheidler, *et al.* in No. 04-1244, counsel for Petitioner Operation Rescue in No. 04-1352, and counsel for Respondents in both cases have each consented to the filing of this amicus brief. The written consent of each counsel accompanies this brief.

robbery or burglary. This dangerously expansive definition of the Hobbs Act violates the plain wording of the statute. The holding threatens free speech by requiring federal courts to mete out draconian punishment, pursuant to the Hobbs Act and RICO, against political protestors who engage in even minor threats or acts of violence. Such actions are already illegal under state law and should be dealt with by the state, not the federal, courts.

STATEMENT

The Hobbs Act criminalizes three activities: (1) extortion (including attempts or conspiracies to commit extortion); (2) robbery (including attempts or conspiracies to commit robbery); and (3) acts or threats of violence "in furtherance of a plan or purpose to do anything in violation of this section." The Seventh Circuit, in an alarming effort to keep this case alive and in direct contradiction to the holding of this Court, has resorted to re-writing the third option to eliminate the explicit requirement that the prohibited violence must be "in furtherance" of a violation of this section, i. e., in furtherance of either robbery or extortion.

The Seventh Circuit disregards the explicit requirement that violence or threats of violence give rise to liability under the Hobbs Act only when they are "in furtherance of" robbery or extortion. Under the Seventh Circuit's interpretation, any freestanding act or threat of violence, however unconnected to the crimes of extortion or robbery, becomes a Hobbs Act violation if the act affects commerce. The Seventh Circuit's re-writing of the Hobbs Act transforms the statute from one that was enacted to penalize crimes of acquisition to one that criminalizes all manner of violence and threats of violence,

regardless of whether the perpetrator intended to acquire property.

Under the Seventh Circuit's ruling, all violent acts and threats which affect interstate commerce become "predicate acts" under the RICO statute (18 U.S.C. §1961) which includes violations of the Hobbs Act (18 U.S.C. §1951) as racketeering acts.

As the instant case graphically illustrates, the expanded definition of the Hobbs Act (and thus the RICO statute) creates a crushing political weapon in the hands of those such as the Respondents, who strive to stifle the voices of those with whom they disagree.

SUMMARY OF ARGUMENT

The decision of the Seventh Circuit misconstrues the plain language of the Hobbs Act. The language of the Hobbs Act is unambiguous and does not cover violent actions unconnected with extortion or robbery. Even assuming, for argument's sake, that the language is ambiguous (which it is not) the expanded interpretation urged by the Seventh Circuit is inconsistent with the legislative history of the Hobbs Act, the RICO statute and the FACE statute, and violates the rule of lenity.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE HOBBS ACT INDICATES THAT IT DOES NOT APPLY TO ACTS OR THREATS OF VIOLENCE THAT ARE UNRELATED TO ROBBERY OR EXTORTION.

It is a fundamental rule of interpreting statutes to begin with the text of the statute. *United States v. Turkette,* 452 U.S. 576, 580 (1981). Words are to be given their ordinary meaning. *Russello v. United States*, 464 U.S. 16, 21 (1983).

The Hobbs Act, 18 U.S.C. § 1951 (a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section*, shall be fined under this title or imprisoned not more than twenty years, or both.

One can violate the Hobbs Act by 1) robbery and attempts or conspiracies to commit robbery; 2) extortion and threats or conspiracies to commit extortion; or 3) threatening or committing violence in furtherance of a violation of this section; i.e., in furtherance of robbery or extortion.

The Seventh Circuit expands the definition of the Hobbs Act by blatantly ignoring the fifteen words (italicized above) that limit and modify the violent acts or threats that constitute the

third option for a Hobbs Act violation. Had Congress intended to federalize prosecution for acts of violence and threats of violence affecting commerce, there would have been no need for those fifteen words, and the words would not have been included. It would be odd and redundant for Congress to combine with the crimes of robbery and extortion the general offense of violent acts against persons and property. Every robbery involves a threat of violence against people or property along with the element of a taking and carrying away of personal property. As such, the Seventh Circuit's interpretation of the statute renders the robbery offense superfluous and obviates its recital in the statute. The statutory construction urged by the Seventh Circuit makes sense only if those italicized 15 words are ignored.

In its ruling, the Seventh Circuit argues against the plain meaning of the statute by noting that, the "physical violence" clause of 18 U.S.C. §1951 (a) would, in many or most cases, define activity already prohibited by the "attempt" or conspiracy prohibitions of the statute. While some overlap may exist, the "physical violence" provision would apply to cases in which a defendant engages in violence or threats of violence which relate to robbery or extortion but which fall short of attempt or conspiracy to commit extortion or robbery. In *United States v. Franks*, 511 F.2d 25, 31 (1975), (in which the court rejected the notion that an act or threat of violence unrelated to extortion or robbery violated the Hobbs Act) the court observed: "We construe the statute as reaching physical violence designed to culminate in extortion, even if the scheme aborts prior to extortion."

If there is a redundancy between the "physical violence"

clause and other prohibitions in the statute, the redundancy undoubtedly exists because Congress intended to avoid any potential and unforeseen loopholes through which an extortionist, robber, or "assistant" could slip. Other redundancies certainly exist within this statute. The term "obstructs, delays, or affects commerce" could probably have been edited to "affects commerce" without any change in the scope of the Act. The terms "article" and "commodity" are redundant because all commodities are articles. The terms "affects commerce" and "the movement of any article or commodity in commerce" are duplicative.

It is apparent that Congress, in defining the Hobbs Act offenses, used definitions that to some degree overlapped, in order to assure that all conduct relating to the crimes of robbery and extortion were prohibited. After all, the Hobbs Act and its predecessor, the 1934 Federal Anti-Racketeering Act, were enacted to address the problem of organized crime, which often involves participation by numerous individuals at many levels. Given the nearly limitless possible scenarios for participation in the crimes of robbery and extortion, it is entirely reasonable that Congress engaged in a bit of verbal superfluity in order to assure that every base was covered.

II. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT IS CONTRADICTED BY THE HOBBS ACT'S LEGISLATIVE HISTORY.

The Hobbs Act is unambiguous on its face. Therefore, no further judicial inquiry as to its meaning is necessary or appropriate, and the Court need not and should not resort to an

analysis of legislative history or to principles of statutory construction. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, (1992). ("When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.")

However, even assuming—but not conceding—that the "physical violence" clause of the Hobbs Act is ambiguous on its face and susceptible to the interpretation set forth by the Seventh Circuit, the legislative history of the Hobbs Act demonstrates that Congress did not intend the statute to apply to acts and threats of violence absent a connection to extortion or robbery.

Any analysis of the Hobbs Act must begin with an analysis of the Act's predecessor, the Federal Anti-Racketeering Act of 1934, 48 Stat. 979, ch. 569, which the Hobbs Act subsequently amended. The original language of the 1934 bill provided that it was a crime to commit or threaten to commit "any act of violence . . . to a person or property" in "connection with or in relation to any act in any way . . . affecting . . . commerce." S. 2248, 73rd Cong. Sec. 2 (1) (1934). (reprinted at 78 Cong. Rec. 5734). After representatives of organized labor expressed concern regarding the breadth of the language, the measure was amended to limit the proscribed activity to robbery, extortion and violence in furtherance of robbery and extortion.[2] Clearly,

---

2 The Anti-Racketeering Act of 1934 provided in pertinent part:

Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trace or commerce—(a) Obtains or

the 1934 Act did not cover freestanding acts or threats of violence unconnected to the crimes of extortion and robbery.

In 1946, the Federal Anti-Racketeering Act of 1934 Act was amended by the Hobbs Act for a single reason: Congress was dissatisfied with this Court's decision in *United States v. Teamsters*, 315 U.S. 521 (1942) wherein the Court held that the 1934 Act did not cover the actions of union truck drivers who exacted money by threats or violence from out-of-town drivers in return for undesired services. The Hobbs Act, then, deleted the exception on which the Court relied in *Teamsters* and substituted specific prohibitions against robbery and extortion. *United States v. Enmons*, 410 U.S. 396, 402 (1973). Congressional debates on the Hobbs Act centered on whether the bill was designed as an attack on organized labor. 91 Cong. Rec. 1148 (1945). In response, supporters of the Hobbs Act steadfastly maintained that the sole purpose of the bill was to prohibit robbery and extortion perpetrated by anyone, including labor unions.

Rep. Hancock of New York, sponsor of the bill, said:

---

attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear. . .;or

(c) Commits or threatens to commit an act of Physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b). . . .

> "The bill is designed simply to prevent both union members and nonunion people from making use of robbery and extortion under the guise of obtaining wages in obstruction of interstate commerce . . . that is all it does." 91 Cong. Rec. 11900 (1945).

Rep. Hobbs, after whom the bill was named, said of the bill:

> ". . .You know it is so clearly expressed that it will do the job it is meant to do, which is to prevent interference with interstate commerce by robbery or extortion. That is all we are shooting at." 91 Cong Rec. 11912 (1945).

No one argued that the Hobbs Act created the entirely new federal crime of violence unconnected to the underlying crimes of robbery or extortion. The resulting 1946 version of the Hobbs Act specifically linked "acts of physical violence" to "robbery" and "extortion."

The 1948 revisions to the Hobbs Act were intended to be limited to formal and stylistic changes. At no point during the revision process did anyone suggest that the Hobbs Act's scope would be expanded to include acts of violence unconnected to robbery or extortion.

Such an expansion of the Hobbs Act would federalize all manner of violent crimes. Yet, this Court has consistently held that it should not too readily interpret federal statutes in a manner that would insert federal jurisdiction in an area traditionally reserved to the states. As noted in *United States v. Enmons*, 410 U.S. 396, 411 (1973):

> [I]t would require statutory language much more explicit

than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

Had Congress intended such a sweeping expansion of the 1934 Act, one would assume that the debate would have at least touched on that issue. It did not. Had Congress intended to extend federal jurisdiction to criminal activity usually reserved to states, it would have used statutory language that explicitly made such provisions. It did not.

III. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT IS ALSO INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE RICO AND FACE STATUTES.

A. The Legislative History of the RICO Statute Militates Against the Seventh Circuit's Interpretation.

In an earlier version of the RICO statute, 18 U.S.C. §1961, racketeering activity was defined as "any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year." Senators Edward M. Kennedy and Philip A. Hart complained that the bill reached beyond "organized crime." The ACLU also opposed the measure, because the definition of "racketeering" could have been used against anti-

war demonstrations at the Pentagon and Columbia University and would result in "a large number of unintended applications." As a result of these objections, the broad language contained in the initial bill was replaced with a list of designated federal and state offenses. *See,* Note, 75 Notre Dame L. Rev. 691, 697-698. If the Court accepts the Plaintiff's interpretation of the Hobbs Act as covering even freestanding acts of violence, the result will be that which Congress, when it enacted RICO, intended to avoid. Violent acts and threats unconnected to robbery and extortion would require federal prosecution under RICO, by means of an expanded Hobbs Act.

If, as the Seventh Circuit suggests, all acts of violence affecting interstate commerce and threats of violence constitute Hobbs Act violations (and thus RICO violations), then it is strange indeed that Congress specifically enumerated, as racketeering acts, a variety of crimes which are inherently violent, including arson, murder and murder for hire. 18 U.S.C. sec 1961. Had Congress intended the Hobbs Act to apply as a catch-all for all violent crimes, there would have been no need to designate these specific violent crimes as "racketeering acts." in the RICO statute. The fact that Congress *did* distinguish certain *specific* violent offenses as predicate "racketeering acts" demonstrates that Congress did not interpret or intend the Hobbs Act (or RICO) to reach all violent conduct and thus to extend federal jurisdiction.

B. The Legislative History of the FACE Statute Militates Against the Seventh Circuit's Interpretation.

Further evidence that the Seventh Circuit's decision is unsupported by legislative history is found in the 1993 debates

regarding the enactment of the Freedom of Access to Clinic Entrances (FACE) 18 U.S.C. §248.[3] Abortion advocates argued that the FACE statute was needed because existing laws (presumably including the Hobbs Act and RICO) were inadequate to protect abortion clinics. During the FACE debates, Attorney General Janet Reno testified "existing Federal laws, while perhaps applicable in some instances [are] inadequate." Hearing before the Senate Committee on Labor and Human Resources, 103rd Cong. 1st Sess. P. 8 (May 12, 1993). Rep. Schumer voiced similar concerns. Hearings before the House Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, 103 Cong. 1st Sess., p. 1 (April 1 and June 10, 1993).

The fact that Congress enacted FACE to address this perceived inadequacy is a further indication that the Hobbs Act did not contain nor could it serve as a catch-all prohibition against violent threats and actions directed against abortion clinics. Notably, Congress did not add FACE violations to the list of RICO predicate acts in 18 U.S.C. sec. 1961. If Congress had intended RICO to address violent protests against abortion clinics, it certainly would have added FACE violations to the list of "racketeering" acts set forth in 18 U.S.C. sec. 1961. It did not.

IV. THE SEVENTH CIRCUIT'S EXPANDED INTERPRETATION OF THE HOBBS ACT

---

3 18 U.S.C. §248 (a) provides criminal and civil penalties for obstructing, injuring, intimidation and interference with persons in connection with reproductive health services.

CONTRADICTS THE RULE OF LENITY.

Assuming *arguendo* that the Seventh Circuit was correct when it stated that the language of the Hobbs Act in question here is susceptible to either of two interpretations, the basic principle of lenity requires that the narrower construction be adopted. This rule was articulated in *Dowling v. United States*, 473 U.S. 207 (1985), in which the Supreme Court determined that bootleg phonograph records were not "goods" obtained by fraud:

> [W]hen assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogative of Congress in defining federal crime prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate.

This Court has noted that the rule of lenity is informed by two policies that have long been a part of our tradition. First, a criminal statute requires that fair warning be given as to the nature of the activity it proscribes; and, second, the legislature and not the courts should define criminal activity to be proscribed. *United States v. Bass*, 404 U.S. 336, 348, (1971). "The Court has often stated that where there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite languages." *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (citations omitted).

This Court has applied the rule of lenity to an effort by the government to expand the Hobbs Act to legitimate labor

disputes in which violence occurred. *U.S. v. Enmons,* 410 U.S. 396, 411 (1973). Lenity "is especially appropriate in construing [a statute which] is a predicate offense under RICO," as this Court has held. *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

The Seventh Circuit's rejection of the rule of lenity is particularly puzzling. The Court, basically, opined that there was so little at stake regarding the two competing interpretations of the Hobbs Act, that the rule of lenity shouldn't apply. Contrary to the opinion of the Seventh Circuit, application of the rule of lenity has never been limited to circumstances in which the sky is falling. If Congress wanted to federalize all violent crime, it must enact legislation that clearly expresses that intent. It has not. Otherwise, the rule of lenity applies to criminal statutes.

CONCLUSION

This Court should reverse the decision of the Seventh Circuit.

Respectfully submitted,

Theresa Schrempp
SONKIN & SCHREMPP PLLC
Eightieth Avenue Professional Building
2955 80th Avenue SE, Suite 201
Mercer Island, WA 98040-2960

Mark L. Lorbiecki
BLACK LOWE & GRAHAM PLLC
701 Fifth Avenue, 48th Floor
Seattle, Washington 98104

September 2, 2005

Nos. 04-1244 and 04-1552

Supreme Court, U.S.
FILED
MAY 11 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, and THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Respondents.

OPERATION RESCUE,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF CONSISTENT LIFE, *ET AL.*, IN SUPPORT OF PETITIONERS

JOSEPH MATHIAS COSGROVE
Counsel for Martin Sheen
1460 Wyoming Ave.
Forty Fort, PA 18704
(570) 823-9078

EDWARD MCGLYNN GAFFNEY, JR. *
Valparaiso University School of Law
656 S. Greenwich Street
Valparaiso, IN 46383
(219) 465-7860

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS—Continued

	Page
A. The court of appeals needlessly generated a circuit conflict by decoupling robbery and extortion from the Hobbs Act.	6
B. The court of appeals needlessly jeopardized the rights of the people to engage in vigorous protest against a wide variety of governmental policies	8
C. The court of appeals needlessly undermines the rights of working people to engage in concerted economic activity protected under the federal labor laws	11
III. THE COURT OF APPEALS IMPROPERLY PERPETUATED A NATIONWIDE INJUNCTION AGAINST UNPOPULAR CIVIL PROTESTORS FOR A FULL TWO YEARS AFTER THIS COURT HAD ORDERED THE INJUNCTION VACATED	15
CONCLUSION	20
APPENDIX A	1a

TABLE OF AUTHORITIES

CASES

	Page
Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987)	15
Baltimore & Ohio R.R. v. *United States*, 279 U.S. 781 (1929)	6
Brown v. Bd. of Educ., 349 U.S. 294 (1955)	17
Carroll v. Princess Anne, 393 U.S. 175 (1968)	18
Cox v. Louisiana, 379 U.S. 536 (1965)	9
Green v. School Bd. of New Kent County, 391 U.S.430, 439 (1968)	17
Jacobellis v.Ohio, 378 U.S. 184 (1964)	4
Milk Wagon Drivers of Chicago v. Meadow Dairies, 312 U.S. 287 (1941)	9
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)	9
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	12
New York Times Co. v. United States, 403 U.S. 713 (1971)	17
In re Sanford Fork & Tool Co., 160 U.S. 247 (1895)	5
Scheidler v. NOW, 537 U.S. 393 (2003)	3, 14, 15
Scheidler v. NOW, 396 F. 3d 807 (7th Cir. 2005)	4, 7-8, 9
United States v. *Enmons*, 410 U.S. 396 (1973)	12, 13, 14, 15

STATUTES AND CITATIONS TO LEGISLATIVE HISTORY

	Page
Federal Access to Clinic Entrance Act, 18 U.S.C. § 248	18
Hobbs Act, Pub. L. No. 486, 60 Stat. 420, 18 U.S.C. § 1951 (1946)	*passim*
Racketeer Influenced and Corrupt Organizations Act (RICO)	*passim*
Wagner Act, 49 Stat. 449 (1935)	11

TABLE OF AUTHORITIES—Continued

	Page
National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*	12
Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. §§ 101-115	19
S. 1861, 91st Cong., Section 2(a) (1969)	2
S. Rep. No. 91-617 (1969)	2, 3
Measures Relating to Organized Crime: Hearings on S.30 and Related Measures Before the Subcomm. on Crim. Laws and Proc. of the Senate Comm. on the Judiciary, 91st Cong. (1969)	2, 3
BOOKS AND LAW REVIEW ARTICLES	
Taylor Branch, *Parting the Waters* (1988)	10
Charles Dickens, *Bleak House* (1994; orig. ed. 1852-1853)	4, 5
Eric Foner, *The Story of American Freedom* (1998)	10
Felix Frankfurter and Nathan Greene, *The Labor Injunction* (1930)	19
Martin Luther King, Jr,. *Stride Toward Freedom: The Montgomery Story* (1958)	10
Leo XIII, *Rerum Novarum* (1891)	18
Brian Murray, "Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms," 75 NOTRE DAME L. REV. 691 (1999)	3
Frances Fox Piven and Richard A. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* 181-263 (1979)	10
Richard A. Resbin, Jr., *A Strike Like No Other Strike: Law & Resistance during the Pittson Coal Strike of 1989-1990* (2002)	19

TABLE OF AUTHORITIES—Continued

	Page
Sullivan's Judicial Profiles: The Illinois Judicial Directory (1996-2005)	8
Juan Williams, *Eyes on the Prize: America's Civil Rights Years, 1954-1965* (1987)	10
Howard Zinn, *A People's History of the United States: 1492—Present* (1999)	10

INTEREST OF *AMICI CURIAE*

Amici[1] are civil rights organizations, labor unions, political groups, voluntary associations or persons who (1) are committed to principles of nonviolent direct action on a wide range of social issues, (2) do not condone the use of violence as a legitimate form of social protest, and (3) do not necessarily agree with the substantive views of the petitioners about abortion (some do and some don't).

Amici are interested in a prompt disposition of this case because the misapplication of the federal Racketeer-Influenced and Corrupt Organizations Act [RICO] exposes them to enterprise liability with staggering penalties (treble damages, attorney fees, nationwide injunctions of great duration) whenever two of more supporters of any of the organizational *amici* (who need not be members of the various organizations or communities appearing in this brief as *amici*) act in a manner deemed by a federal judge to constitute an act or threat of violence against a person engaged in interstate commerce or against the property of such a person.

Committed as the *amici* are to nonviolence, they are also aware that the lower court's misreading of the Hobbs Act places all of the *amici* in grave financial jeopardy if any of our supporters engage in conduct vaguely defined as a threat to property affecting interstate commerce. This judicial imposition of vicarious liability for loosely connected supporters of various causes espoused by *amici* is at odds with the text of the statute itself and threatens to chill the efforts of the *amici* to involve as many as possible in the goals they seek to advance in our democracy.

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

This brief is submitted with the consent of the parties, whose consent letters have been filed with the Clerk of the Court. The particular interests of the *amici* curiae are stated in Appendix A.

REASONS FOR GRANTING THE PETITION

I. BY DISREGARDING THE CLEAR MANDATE OF THIS COURT, THE COURT OF APPEALS LEFT OPEN THE POSSIBILITY THAT THE FEDERAL RACKETEERING STATUTE CAN BE MISUSED AGAINST POLITICAL AND LABOR PROTESTERS OF ALL SORTS BY THEIR POLITICAL ADVERSARIES.

A. Congress never intended RICO to apply to civil protesters.

Amici do not propose that the Court look to isolated sentences in a committee report or a floor debate, but to the *amendment of the text of the statute* after consideration of serious objections to the preexisting bill. In 1969 the bill that would eventually become RICO defined "racketeering activity" very broadly to include "any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year." S. 1861, 91st Cong., Section 2(a) (1969). *see also* 115 Cong. Rec. 9569 (1969). Several objected to this language. For example, Senators Edward Kennedy and Philip Hart complained that the bill reached beyond "organized crime." S. Rep. No. 91-617, at 215 (1969). The American Civil Liberties Union also opposed the bill, expressing the concern that social and political protesters might fall within the bill's ambit. The ACLU found the breadth of the original definition of racketeering activity "particularly troublesome," citing the anti-war demonstrations at the Pentagon and at Columbia University. *Measures Relating to Organized Crime: Hearings on S.30 and Related Measures Before the Subcomm. on Crim.*

Laws and Proc. of the Senate Comm. on the Judiciary, 91st Cong. 475-76 (1969). The ACLU feared that this version of the bill would be used by the Nixon Administration to suppress anti-Vietnam war dissent. The Department of Justice also objected to the sweeping definition of "racketeering activity" in the bill, arguing that it was "too broad and would result in a large number of unintended applications." S. Rep. No. 91-617, at 121-22. Deputy Attorney General Richard G. Kleindienst suggested an amendment to narrow the definition to a list of specific offenses "customarily invoked against organized crime." *Id.* at 158.

In response to these misgivings, the Senate Judiciary Committee eliminated the broad language defining "racketeering activity" as "danger of violence to life, limb or property," and replaced it with a list of designated federal and state offenses, such as the Hobbs Act. The new language was virtually identical to that recommended by the Justice Department. The Senate adopted the revised bill by a vote of seventy-three to one. 116 Cong. Rec. 972 (1970). The House then made minor amendments with which the Senate concurred. *Id.* at 36,296. President Nixon signed the bill into law on October 15, 1970. *See* Brian Murray, "Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms," 75 NOTRE DAME L. REV. 691, 697 & n.21 (1999).

One of the objectionable features of the opinions of the court of appeals on remand is that three unelected judges have, in effect, reinstated the arguably unconstitutional broader version of the bill that the Senate expressly rejected. And the court of appeals completely ignored the concerns of Justices Ginsburg and Breyer about the expansive use of RICO, *Scheidler v. NOW*, 537 U.S. 393, 411-12 (2003) (*Scheidler II*), (Ginsburg, J., concurring), No. 04-1352, Pet. App. 48a-49a.

Congress emphatically did not intend RICO to be used as a bludgeon against social protesters, as the lower courts have

done not only in this case, but also in other cases directly affecting some of the amici. The Court should issue the writ now to reinstate a sensible construction of RICO and the Hobbs Act.

B. Enough is enough.

As a practical matter, there must be some finality to litigation. Amici are activists who may not be able to define with precision the point when finality is or should be reached. But like Justice Stewart's famous assessment of another matter, amici know waste of time and precious resources when they see it. *See Jacobellis v.Ohio*, 378 U.S. 184, 194 (1964) (Stewart, J., concurring). This lawsuit has gone on for nearly two decades and makes the lawyers in Chancery described in Charles Dickens's *Bleak House* (1994; orig. ed. 1852-1853) look like models of efficiency as they wore down the estates of decedents through filing document after document.

In its most recent order, the court of appeals assures the parties that it does not mean to "open Pandora's Box," but "merely resolves the final loose ends in this long-running litigation." No. 04-1244, Pet. App. 16a. But this Court already resolved all the "loose ends" of this litigation in 2003. The court of appeals has needlessly prolonged the case for two years, and has proposed a recipe for further delay by remanding to the district court to decide among various competing views on how to read the Hobbs Act. And it did so after strongly suggesting that a Hobbs Act violation can occur without robbery or extortion, a view plainly at odds with the other circuits that have considered this question. See No. 04-1244, Pet. 18-22. No matter what the trial court does, the losing side would surely then appeal back to the very court that created the confusion and the circuit conflict in the first place, and then back up to this Court. So it saves a lot of time and money for this Court to decide now the three questions

presented, two of which can be disposed of summarily by vacating the opinions below.

During the two years during which the court of appeals has been pondering this Court's order in *Scheidler II*, a nationwide injunction has remained in place. We discuss the question of the availability of injunctive relief by private litigants in a civil RICO action in Part III below.

The ingenuity of the lawyers for respondents in pleading new causes of action at various stages of this litigation or in switching theories in midstream, and the tenacity of lawyers in prolonging a case long after this Court had ended it might be explained by a hope of recovering an award of attorney fees if they eventually prevail on some theory or another.

In this case, lawyers for the respondents did not plead or prove that any particular defendant engaged in violent activity. They did not attempt such particularized proof because they have no evidence that this occurred. Instead, they turned to the federal racketeering law, obfuscating a fact demonstrated above: RICO was never intended by Congress to apply to civil protesters at all. In short, they are close to the description of "fog everywhere" that Dickens used to describe the activity of lawyers in Chancery in nineteenth-century London. *See* Charles Dickens, *Bleak House* 1 (1994; orig. ed. 1852-1853).

Most of the *amici* who join this brief also joined the briefs filed in the October 2001 Term. Few of the amici are lawyers, but even the non-lawyers wondered how a lower court could, in effect, reverse this Court. *See, e.g., In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). When asked to consider joining another brief this Term on the same matter in the same case, most of the amici spontaneously observed that *endless litigation eats up the meager resources of people who espouse unpopular views*. We now say respectfully to the Court, "Enough is enough." Grant the petitions in Nos. 04-

done not only in this case, but also in other cases directly affecting some of the amici. The Court should issue the writ now to reinstate a sensible construction of RICO and the Hobbs Act.

B. Enough is enough.

As a practical matter, there must be some finality to litigation. Amici are activists who may not be able to define with precision the point when finality is or should be reached. But like Justice Stewart's famous assessment of another matter, amici know waste of time and precious resources when they see it. *See Jacobellis v.Ohio*, 378 U.S. 184, 194 (1964) (Stewart, J., concurring). This lawsuit has gone on for nearly two decades and makes the lawyers in Chancery described in Charles Dickens's *Bleak House* (1994; orig. ed. 1852-1853) look like models of efficiency as they wore down the estates of decedents through filing document after document.

In its most recent order, the court of appeals assures the parties that it does not mean to "open Pandora's Box," but "merely resolves the final loose ends in this long-running litigation." No. 04-1244, Pet. App. 16a. But this Court already resolved all the "loose ends" of this litigation in 2003. The court of appeals has needlessly prolonged the case for two years, and has proposed a recipe for further delay by remanding to the district court to decide among various competing views on how to read the Hobbs Act. And it did so after strongly suggesting that a Hobbs Act violation can occur without robbery or extortion, a view plainly at odds with the other circuits that have considered this question. See No. 04-1244, Pet. 18-22. No matter what the trial court does, the losing side would surely then appeal back to the very court that created the confusion and the circuit conflict in the first place, and then back up to this Court. So it saves a lot of time and money for this Court to decide now the three questions

presented, two of which can be disposed of summarily by vacating the opinions below.

During the two years during which the court of appeals has been pondering this Court's order in *Scheidler II*, a nationwide injunction has remained in place. We discuss the question of the availability of injunctive relief by private litigants in a civil RICO action in Part III below.

The ingenuity of the lawyers for respondents in pleading new causes of action at various stages of this litigation or in switching theories in midstream, and the tenacity of lawyers in prolonging a case long after this Court had ended it might be explained by a hope of recovering an award of attorney fees if they eventually prevail on some theory or another.

In this case, lawyers for the respondents did not plead or prove that any particular defendant engaged in violent activity. They did not attempt such particularized proof because they have no evidence that this occurred. Instead, they turned to the federal racketeering law, obfuscating a fact demonstrated above: RICO was never intended by Congress to apply to civil protesters at all. In short, they are close to the description of "fog everywhere" that Dickens used to describe the activity of lawyers in Chancery in nineteenth-century London. *See* Charles Dickens, *Bleak House* 1 (1994; orig. ed. 1852-1853).

Most of the *amici* who join this brief also joined the briefs filed in the October 2001 Term. Few of the amici are lawyers, but even the non-lawyers wondered how a lower court could, in effect, reverse this Court. *See, e.g., In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). When asked to consider joining another brief this Term on the same matter in the same case, most of the amici spontaneously observed that *endless litigation eats up the meager resources of people who espouse unpopular views*. We now say respectfully to the Court, "Enough is enough." Grant the petitions in Nos. 04-

1244 and 04-1352 and summarily reverse the court of appeals. *See, e.g., Baltimore & Ohio R.R.* v. *United States*, 279 U.S. 781, 785 (1929).

II. THE SEVENTH CIRCUIT'S INTERPRETATION OF THE HOBBS ACT CONFLICTS WITH THAT OF OTHER CIRCUITS, IGNORES THE LONG HISTORY OF SOCIAL PROTEST IN THIS COUNTRY, NEEDLESSLY JEOPARDIZES THE RIGHTS OF THE PEOPLE TO ENGAGE IN VIGOROUS PROTEST TO A WIDE VARIETY OF GOVERNMENTAL POLICIES AT A MOMENT WHEN WE ARE TRYING TO EXPORT DEMOCRACY ABROAD, AND UNDERMINES THE RIGHTS OF WORKING PEOPLE TO ENGAGE IN CONCERTED ECONOMIC ACTIVITY PROTECTED UNDER THE FEDERAL LABOR LAWS AT A TIME OF INCREASED VULNERABILITY OF ORGANIZED LABOR.

A. The court of appeals needlessly generated a circuit conflict by decoupling robbery and extortion from the Hobbs Act.

The text of the Hobbs Act adopted in 1946 clearly links the federal violation with the common law crimes of robbery and extortion. Section 2 provides: "Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, *by robbery or extortion*, shall be guilty of a felony." Section 5 provides: "Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of section 2* shall be guilty of a felony." Pub. L. No. 486, 60 Stat. 420 (1946) (emphasis added).

This case has never involved any allegation of robbery, for none of the anti-abortion protestors ever *stole* any property

from any of the clinics at which they engaged in sit-ins. And the law of the case determined by this Court in *Scheidler II* is that this case no longer involves any contention about extortion, for none of the anti-abortion protestors ever *obtained by force or violence* any property from any of the clinics at which they staged protests. Since the two crimes expressly mentioned in the Hobbs Act have no relevance to this case, the Court's concluding paragraph was ineluctable: "Because *all of the predicate acts supporting the jury's finding of a RICO violation must be reversed*, the judgment that petitioners violated RICO must also be reversed." *Scheidler II*, 537 U.S., at 411 (emphasis added), No. 04-1352, Pet App. 48a.

Nevertheless, on remand the court of appeals held the case for a full year—a long time to ponder a clear mandate—and then took another year to rule on the petition for rehearing. What emerged from all this judicial deliberation was not the birth of a new legal vision of the relationship of federal and state crimes, nor even a bold statement of how the Hobbs Act must be sensibly construed, but only a meek iffy supposition that "it is *not beyond the realm of possibility* that the revisers *may have made* certain substantive changes, either advertently or inadvertently." No. 04-1244, Pet. App.,15a.[2]

After all this waiting, the court of appeals directed the district court to consider a novel view of the Hobbs Act that had been rejected by all other circuits that have considered it. *See* No. 04-1244, Pet. 18-22. Judge Wood[3] wrote: "it would

---

[2] In the *Ars Poetica*, the ancient Roman poet Horace wrote: "Parturient montes, et nascitur ridiculus mus." ("The mountains are in labor, and a ridiculous mouse is born.")

[3] The perception of dispassionate fairness in the disposition of this case by Judge Wood is blurred when one discovers that the same Circuit Judge who authored (1) the opinion that this Court reversed 8-1 in 2003, (2) the unpublished order a year later in 2004 resuscitating the case, and (3) the published opinion this year denying the petition for rehearing has been throughout her judicial career a member of the Respondent National

be imprudent to resolve this problem of statutory interpretation at this stage" and she elected instead to follow "for reasons of judicial economy and restraint . . . a wait-and-see approach." No. 04-1244, Pet. App., 6a-7a, 15a-16a. "Imprudent"? It is not imprudent; it is impertinent for a lower court to ignore the mandate of this Court. "Judicial economy"? The court of appeals wasted judicial resources by prolonging a case that this Court ended over two years ago. "Restraint"? The court of appeals was unrestrained in page after page attacking the sensible view of the Hobbs Act offered by the petitioners in their briefs below. "Wait-and-see"? This is not a case about the rule against perpetuities; it is a case that misapplies RICO to social protesters.

B. The court of appeals needlessly jeopardized the rights of the people to engage in vigorous protest against a wide variety of governmental policies.

Amici include famous civil rights activists who bore the brunt of the violence of arch-segregationists like Bull Connor and George Corey Wallace, but they overcame that violence by nonviolence. The civil rights of African Americans were the focus of major protests against a brutal pattern of systematic discrimination in housing, employment, schooling, and the franchise. In response to this organized violence

---

Organization of Women, or from the year 2000 to the present a member of the Chicago chapter of NOW. *See Sullivan's Judicial Profiles: The Illinois Judicial Directory* 840 (1996); *id.*, 639 (1997-1998); *id.* 727 (1998-1999); *id.* 726 (1999-2000); *id.* 744-745 (2000-2001); *id.* 745 (2001-2002); *id.* 771 (2002-2003) *id.* 775 (2003-2004); and *id.* 780 (2004-2005). Amici have not checked this information for accuracy, but such information in reference publications of this sort is generally provided to the publisher by the subject of the profile.

practiced both by the government and by private parties, Dr. Martin Luther King, Jr., the principal leader of the movement to end legalized apartheid in this country, preached and lived a commitment of nonviolence. This commitment to nonviolence, however, did not guarantee there never were any instances in which civil rights protestors threatened violence to the property of a merchant engaged in discriminatory hiring practices. On the contrary, that very fact pattern was the subject of a ruling by this Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). As Justice Stevens wrote in *Claiborne Hardware,* "Speech does not lose its protected character simply because it may embarrass others or coerce them into action." *Id.* at 910; *see also Cox v. Louisiana*, 379 U.S. 536, 551-552 (1965) (since one of the functions of free speech is "to invite dispute," it may "best serve its high purpose when it induces a condition of unrest ... or even stirs people to anger").

The district court considered petitioners' arguments about *Claiborne Hardware*, but preferred instead to follow *Milk Wagon Drivers of Chicago v. Meadow Dairies*, 312 U.S. 287 (1941) (upholding an injunction prohibiting both violent and nonviolent picketing activity because of the violent environment and conduct surrounding the activity). No. 04-1244, 127a-128a. The court of appeals considered *Claiborne Hardware* in passing, see No. 04-1444, Pet. App. 48a-49, but the logic of the court of appeals is as completely at odds with *Claiborne Hardware* as it is in defiance of the mandate of this Court in *Scheidler II*. *Claiborne Hardware* set clear limits on the imposition of vicarious or enterprise liability upon an entire group for the conduct of some members who might have known of and authorized illegal tactics by that organization, while most of the membership remained truly innocent of any illegal acts committed by the organization. *Claiborne Hardware* should not be reversed under the table by lower courts.

If RICO had been on the books back in the 1960s and if the lower court's reading of RICO is right, then Dr. King and the SCLC would have been vulnerable to losing all of their assets to their arch-segregationist racial-supremacist adversaries. All it would have taken to reach that bizarre result is for a federal judge to have viewed the "trespass" by sit-in protesters at racially segregated lunch counters as a "threat of violence" to the property of the Woolworth company! Similarly, Rosa Parks' famous refusal to sit in the back of the bus, which triggered a year-long, city-wide boycott of the Montgomery buses, would certainly qualify as a "threat to property affecting interstate commerce." *See, e.g.*, Martin Luther King, Jr., *Stride Toward Freedom* (1958); for brief sketches of similar events in the civil rights movement, *see, e.g.*, Taylor Branch, *Parting the Waters* (1988); Howard Zinn, *A People's History of the United States: 1492—Present* 440-450 (1995); Frances Fox Piven and Richard A. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* 181-263 (1979, with bibliography); Juan Williams, *Eyes on the Prize: America's Civil Rights Years, 1954-1965* (1987); and Eric Foner, *The Story of American Freedom* 275-87 (1998).

As a practical matter, moreover, the lower court's reading of the Hobbs Act is impossible for a leader of a protest movement to enforce. It is bound to happen sooner or later that a member of a loosely defined movement may do things that are not authorized by the leadership, especially in the heat of the moment, when tempers and emotions run high. The net effect of the Seventh Circuit's novel reading of the Hobbs Act is that any deed of protest that bothers an entrenched political establishment or a powerful commercial interest can become subject to the draconian remedy of treble damages authorized under the federal racketeering law and, under the view of RICO adopted by the court of appeals, even to nation-wide injunctions to stop protesters' "offensive" activity all over the country, *see* Part III below, all because of the acts of a few uncontrolled parties who turn up at a rally.

This surely is not the message that this country should be sending to the world at a moment when we are concerned with the growth of democratic values elsewhere in the world.

In times of crisis, the People rather than governmental officials (arresting officers, angry mayors or governors or legislators, even judges who yield to the passion of the day), have often been the moral compass of society. Law has not only been an instrument of establishing justice, but has also become a means of coerced injustice. In such moments the People have frequently protested the moral flaws of the law, whether enacted by the people's representatives or pronounced by the judiciary. For this principle of democracy to thrive at a time we are trying to urge greater openness to democracy in other cultures, vigorous social protest cannot flourish with a case that imposes on protesters severe penalties under the federal racketeering laws.

C. The court of appeals needlessly undermines the rights of working people to engage in concerted economic activity protected under the federal labor laws.

As the wide spectrum of opinion reflected in the makeup of the *amici* suggests, the interpretation of the Hobbs Act offered by the court of appeals can have a devastating effect on social protest movements of all stripes. It can be particularly injurious to the rights of organized labor to bargain collectively over terms and conditions of employment and to engage in concerted protected activity, such as picketing an employer over alleged unfair labor practices.

Labor history is replete with episodes of brutal violence against workers attempting to organize and to withhold their services if negotiations failed. Examples include the railroad strike of 1877, the Haymarket Square affair of 1886, the Pullman Strike of 1895, the Minneapolis strike of 1934, and the strike by the International Longshoremen's Association

in San Francisco in 1934 that led to a general strike joined by twenty other unions. As tension between labor and management mounted during the Depression era, Congress responded by enacting the Wagner Act, 49 Stat. 449 (1935), sustained against a commerce clause challenge in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The NLRA, 29 U.S.C. §§ 151 et seq., protects the rights of workers to organize for purposes of collective bargaining over terms and conditions of their employment, and the right of workers to engage in "protected concerted activity," including picketing and boycotting.

Adversaries of the labor movement have long advocated the use of the Hobbs Act as a weapon against unionism. That is precisely what this Court rejected in *United States* v. *Enmons*, 410 U.S. 396 (1973). After *Enmons* the foes of organized labor then tried to persuade Congress to amend the Hobbs Act in this fashion, but failed in these legislative efforts. Now these foes of organized labor have been handed an astonishing victory by the court of appeals, whether it did so "advertently or inadvertently." *See* No. 04-1244, Pet. App. 15a (commenting on the 1948 revisions of the Hobbs Act, which, according to the court of appeals were either "formal, stylistic changes" or "substantive changes, whether advertently or inadvertently").

Decoupled from the two crimes specified in the Hobbs Act, robbery and extortion, this federal statute could become a nightmare for organized labor. Under the loose construction of the act suggested by the court of appeals, tensions between workers and management that erupt into a vaguely defined "threat to property affecting interstate commerce" is now the predicate for a RICO suit in the three states of the Seventh Circuit. The rights of workers secured under the NLRA have not been nullified by the court of appeals in some overt, direct assault upon the New Deal. Instead, the court of appeals has eroded the meaning of the Hobbs Act and in so doing has invited foes of organized labor to use the federal racketeering

statute as an end run around the agency charged with protecting concerted union activity, the NLRB.

The opinion of the court of appeals can be read as an open invitation to foes of organized labor to file RICO suits against labor unions whenever two or more workers threatens the property rights of someone engaged in interstate commerce, through trespass or otherwise. Thus, if RICO had been on the books back in the 1930s and if the lower court's reading of RICO is right, the UAW and the Reuther brothers would have been vulnerable to losing all of their assets. All it would have taken to reach that bizarre result is for a federal judge to have viewed the "trespass" by auto workers on the Ford Motor Company's property as a "threat of violence to property" to Ford during the famous UAW sit-down strike at the Ford plant in 1937, even though no one would say that the UAW workers were robbing Henry Ford or engaging in extortion!

The construction of the Hobbs Act proposed by the court of appeals, is moreover, irreconcilable with *United States* v. *Enmons*, 410 U.S. 396 (1973). *Enmons* involved serious allegations of violence against a company by union members, who allegedly fired high-power rifles at the employer's facility and blew up a company transformer, in order to achieve higher wages. Nonetheless, this Court affirmed the dismissal of the one-count Hobbs Act indictment in the case. As Justice Stewart noted, "In the nearly three decades that have passed since the enactment of the Hobbs Act, no reported case has upheld the theory that the Act proscribes the use of force to achieve legitimate collective-bargaining demands." *Id.* at 408.

Justice Stewart addressed the issue of excessive punishment as follows: "The worker who threw a punch on a picket line, or the striker who deflated the tires on his employer's truck would be subject to a Hobbs Act prosecution and the possibility of 20 years' imprisonment and a $10,000 fine." *Id.* at 410.

Just as the decision of the court of appeals is irreconcilable with *Enmons*, so too it should be noted that *Enmons* is entirely in harmony with *Scheidler II*, which rested upon the very distinction between extortion and coercion that the Court had addressed in *Enmons*: "The Government's broad concept of *extortion*—the 'wrongful' use of force to obtain even the legitimate union demands of higher wages—is not easily restricted. It would cover all *overtly coercive conduct* in the course of an economic strike, obstructing, delaying, or affecting commerce." *Id.* at 410 (emphasis added).

As with civil rights leaders, *see* Part II B above, so also labor leaders know that as a practical matter, the criterion the lower court invented is impossible to maintain. Union leaders can try mightily to impress upon the rank and file the need to picket in a peaceful manner, but tempers can fly in these situations, especially if there is a prolonged strike. As this Court concluded in *Enmons*, "it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States." *Id.* at 411.

The logic of the lower court is completely at odds with this Court's holding in *Enmons* and in *Scheidler II*, neither of which stand for the astonishing proposition that the Hobbs Act may be prosecuted or be understood without reference to the two crimes specified in the Act, robbery and extortion. For this reason alone, the Court should issue the writ to resolve the conflict between the judgment below and the mandate of this Court in this very case and with its ruling in *Enmons*. Congress considered and rejected the opportunity to amend the Hobbs Act to allow it to apply to labor activity.

We, the People, did not ordain unelected judges to do to a statute what our representatives in the political branches expressly refused to do.

III. THE COURT OF APPEALS IMPROPERLY PERPETUATED A NATIONWIDE INJUNCTION AGAINST UNPOPULAR CIVIL PROTESTORS FOR A FULL TWO YEARS AFTER THIS COURT HAD ORDERED THE INJUNCTION VACATED.

At the conclusion of the trial in this case in 1999, the district court entered a nationwide permanent injunction regulating petitioners' future protest activities at abortion clinics. No 04-1244, Pet. App., 141a-174a. The court of appeals affirmed "in all respects." *Id.* at 61a (last word of 2001 order).

This Court reversed, concluding its opinion on February 26, 2003 with three clear commands: (1) "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed," (2) "the judgment that petitioners violated RICO must also be reversed," and (3) "[w]ithout an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." *Id.* at 411. Those three commands are, of course inter-related. Without *any* predicate acts, the RICO judgment had to fall. And without a final judgment favoring the respondents, the injunction had to be vacated. *See e.g., Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546, n. 12 (1987).

For these reasons amici imagined that the case was over, but we underestimated the capacity of lawyers and judges to extend the life of a case. After pondering the case for a full year, the court of appeals issued an unpublished order remanding the case to the district court to determine whether four unspecified "acts or threats of physical violence to any

person or property" are sufficient to support the nationwide injunction it imposed. No. 04-1244, Pet. App. 25a-29a.

Amici supposed further that it was because the case was definitively resolved in favor of the petitioners that this Court determined that it need not address the moot question "whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." In our brief on the merits in *Scheidler II* we addressed that question. We touch on this issue now briefly, offering the Court a perspective on injunctions that comes from the considerable cumulative experience of the amici as social activists engaged in civil protest on a wide variety of contentious and difficult issues, including animal rights, civil rights, death penalty, disability issues, international human rights, environmental protection, and war and peace.

First, *amici* note the duration of the injunction. More than two years after this Court ordered the injunction to be vacated, the injunction in this case is still ongoing. This injunction was ordered against protest activity that happened nearly twenty years ago. It has been in force for nearly six years, and if the lower court is right, it could go on for years to come. See No. 04-1244, Pet. App. 141a-142a (on July 28, 1999, district court entered injunction, to run for 12 years). The duration of this injunction deeply troubles the *amici*. This is not a desegregation case from the 1950s and 1960s requiring federal courts to retain jurisdiction over injunctions precisely because of recalcitrant school boards openly defying court orders. This is a case about social activists using tactics similar to those used by SNCC and other civil rights activists in the 1960s—sitting-in and sitting-down—to stop activity they deem immoral. Not all of the *amici* agree with petitioners on the substantive issue of abortion, but all of us have a hard time understanding why a lower court would so brazenly disregard the words of this Court that seem to us plain: "Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated."

This Court did not add a specific chronological dimension to its order, such as "with all deliberate speed" or "instanter" or "now." It had no cause to do so in 2003, for when this Court issues an order to vacate an injunction, the normal assumption would be that it would be done promptly. When the Court used the phrase "with all deliberate speed," *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955), it intuited that the subject of its order—racial desegregation of public schools—would take time to achieve, and it intentionally left to the district courts the task of devising desegregation plans in their region of the country. But the order in this case was not to begin to devise plans for "the dismantling of well-entrenched dual [school] systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution." *Green v. School Bd. of New Kent County*, 391 U.S.430, 439 (1968). The order in this case was simply to dissolve an injunction that no longer had any legal basis. To vacate the injunction in this case does not take much time. It only takes the humility to follow a direct order from this Court. After a decade of foot-dragging by local officials in Virginia, this Court amended the ambiguous term "with all deliberate speed" to the direct and simple term "now." *Green, id.* It is now the moment for the Court to use the same adverb in this case. The injunction should be vacated *now*.

When First Amendment right are implicated, this Court has given explicit directions for the speed with which it expects its mandates to be complied with. For example, when the government obtained an injunction from one court of appeals against the publication of the Pentagon Papers, this Court granted expedited review, reversed the circuit that had granted the injunction, vacated the stays that the Court had ordered, and directed: "The judgments shall issue *forthwith*." *New York Times Co. v. United States*, 403 U.S. 713,714 (1971) (emphasis added). Justice Black took the view that "every moment's continuance of the injunctions

against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment." *Id.* at 715 (Black, J., concurring). In *Carroll v. Princess Anne*, 393 U.S. 175 (1968), a white supremacist organization conducted a public rally at which "aggressively and militantly racist" speakers attacked "primarily Negroes and, secondarily, Jews" with "deliberately derogatory, insulting, and threatening language." *Id.* at 176. The state appellate tribunal had already dissolved the permanent injunction, which was to last for *ten months* on the ground that "the period of time was unreasonable and that it was arbitrary to assume that a clear and present danger of civil disturbance and riot would persist for ten months." *Id.* at 177-78. This Court took the case to reverse the *ex parte* temporary restraining order of *ten days*' duration.

Second, even if this Court had not ruled with clarity about the nationwide injunction in this case, protest activity in front of abortion clinics is now governed by the Federal Access to Clinic Entrance Act, 18 U.S.C. § 248. This statute was enacted because Attorney General Reno and the Attorneys General of several states took the view that no federal law—including the Hobbs Act and RICO—afforded any protection to abortion clinics under the circumstances of protests in front of clinics at the time.

Third, many of the amici are labor unions with collective memory of the nefarious use of injunctions to prohibit workers from strikes and boycotts and other economic activity to protest that inadequacy of compensation that does not amount to a "living wage," defined in religious social thought as the amount of money "necessary to raise a family in decent and frugal comfort." *See, e.g,* Leo XIII, *Rerum Novarum* (1891).

A distinguished member of this Court contributed the definitive study of the misuse of federal and state judicial authority in ordering workers and unions to refrain from

concerted activity now protected under the NLRA. *See* Felix Frankfurter and Nathan Greene, *The Labor Injunction* (1930). Congress responded with the Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. §§ 101-115 (prohibiting labor injunctions). *But see* Richard A. Resbin, Jr., *A Strike Like No Other Strike: Law & Resistance during the Pittson Coal Strike of 1989-1990* 27-28, 39, 57-58, 62-64, 109-110, 148-50, 155-56, 163-67, 197-99 (2002) (detailing injunctions against strikers). If uncorrected by this Court, the opinion of the court of appeals will invite foes of organized labor to avoid the already weakened restraint against labor injunctions by the simple device of using civil RICO against unions.

Finally, amici have considerable experience with public demonstrations of popular dissent from controversial policies. They are often ordered by judges not to do this or that. For example, a large group of Americans, including several of the amici, regularly protest against the exportation of torture and the assassination of political opponents of brutal regimes. They do so in front of Fort Benning, Georgia, which houses a program for foreign military and security officials that has included training in the use of torture. The alumni of the School of the Americas have been engaged in death squads. They include the assassins of Archbishop Oscar Romero and of six Jesuit priests and their housekeepers in El Salvador. Each year the "security" arrangements at Ft. Benning get tighter, and each year a federal judge places further restrictions upon activity that amici deem essential to a vital democracy. When elderly nuns cross the line the judge draws in his imaginary sand, he then imposes the maximum sentence allowable, ordering the nuns off to long terms of incarceration for daring to stand against a policy they deem at odds with fundamental decency and with this country's commitment to international humanitarian law specified in treaties and covenants to which this nation is a high contracting party.

The decision by the court of appeals to ignore the mandate of this Court dissolving the injunction in this case has the effect of emboldening judges all over the country who are so minded to issue injunctive relief where they should be thinking instead of preserving the fragile ability of the People to bring their government back to decency and sanity.

CONCLUSION

The Court should either issue the writ in Nos. 04-1244 and 04-1352 and summarily reverse on the issues in which the court of appeals has strayed far from the Court's mandate, or it should issue an extraordinary writ of mandamus commensurate with the extraordinary mishandling of this case by of the court of appeals. If the Court grants the writ and places the case on its docket for plenary review, amici will brief the Court on numerous examples from the history of the struggle for the effective protection of the civil rights of the emancipated slaves, of women, and of working people, that illustrate that the view of the court of appeals is not only inconsistent with the legislative history of the Hobbs Act and of RICO, but also with the broader social and political history of the American people.

Respectfully submitted,

JOSEPH MATHIAS COSGROVE
Counsel for Martin Sheen
1460 Wyoming Ave.
Forty Fort, PA 18704
(570) 823-9078

EDWARD MCGLYNN GAFFNEY, JR. *
Valparaiso University School
of Law
656 S. Greenwich Street
Valparaiso, IN 46383
(219) 465-7860

* Counsel of Record

APPENDIX

APPENDIX A

Statements of Interest of *Amici Curiae* Communities and Voluntary Associations

As noted in the text of the brief, *amici* are voluntary associations and individuals who engage in protest on a wide variety of issues. Because Consistent Life organized the participation of these *amici* in this brief, it is listed first.

Consistent Life [CL] is a coalition of groups and individuals committed to nonviolence and respect for life. The network promotes the consistent life ethic, focusing on the connections among issues concerning human life, including war, abortion, poverty, racism, the arms race, the death penalty and euthanasia. CL supports all means of nonviolent change including, but not limited to, nonviolent direct action, political and legislative action, and direct service to those suffering under these attacks on life. Lana Jacobs (current executive director of CL), Carol Crossed (former executive director of CL), Mary S. Rider (former executive director), and Ruth Enero (former president of the Board of Directors) have frequently engaged in nonviolent civil disobedience relating to the issues listed above. All five are married women and mothers of many children. If their political opponents were to use civil RICO against them, the loss of their homes, cars, and other valuable things they own would wreak havoc upon them and their families. Ms. Rider offered a declaration before the district court in this case at the stage when it was considering the issuance of the nationwide injunction against anyone associated with the Pro-Life Abortion Network [PLAN]. This declaration challenged the enormous breadth of the nationwide injunction.

Agape is a community of faith in Franklin, Louisiana, that witnesses for peace and justice through nonviolence. It engages in education of its members and the public, especially on the death penalty, through publishing booklets,

brochures, and treatises on how to effect change through raising public awareness and consciousness about issues of justice and peace.

Carolina Interfaith Task Force on Central America (CITCA) is a voluntary association of persons who believe in nonviolent direct action on issues relating to peace and justice in Central America. CITCA notes that all citizens of the United States have the right to express their views on controversial matters in a nonviolent fashion. This right is jeopardized when federal courts penalize citizens for exercising rights that are fundamental parts of the Bill of Rights.

The Catholic-Labor Network is a place for Catholics who are active in their churches and unions to learn about their Church's teachings regarding labor issues, to pray for those who are working for economic justice, and to share information about events and struggles taking place in their area.

The Catholic Peace Fellowship (CPF) is a nationwide organization of Catholics committed to peacemaking in the name of Christ. CPF engages in educational projects about peace and nonviolence, and it supports those who stand for peace by virtue of conscience. For example, some of the members of CPF have engaged in nonviolent civil disobedience of laws and policies inimical to peace in today's world.

The Catholic Worker (CW) is a lay Catholic community founded by Dorothy Day and Peter Maurin to bear witness to the Gospel that identifies service to the hungry, the thirsty, the homeless, and the imprisoned as a way of recognizing the presence of God in categories of human need. The community provides hospitality to homeless families while working to address the root causes of homelessness. Committed to following the teachings of Christ on nonviolence, each CW house or center engages in acts of hospitality and witness to Gospel values in a variety of ways, including demonstrations against war and militarism, poverty, and abortion. The CW

houses that join this brief are: the Casa Juan Diego (Houston, Texas); Dorothy Day Catholic Worker House (Washington, D.C.); the Day House (Detroit, Michigan); Ithaca, New York Catholic Worker; the Los Angeles Catholic Worker; Mary's House (Birmingham, Alabama); Redwood City (California) Catholic Worker; St. Francis Catholic Worker Community (Columbia, Missouri); and the St. Francis and Therese Catholic Worker House (Worcester, Massachusetts).

Center for Action and Contemplation is a Christian center forwarding the integration of social action and contemplative prayer. The members of this community regularly engage in transforming society around the issues of poverty, war, and other kinds of violence.

Citizens United for Alternatives to the Death Penalty (CUADP) is a national organization that works to end the death penalty in the United States through aggressive campaigns of public education and the promotion of tactical grassroots activism. CUADP takes no position on the abortion issue. It does not endorse or support the stand of these defendants on that issue, nor does it necessarily approve of their tactics or actions. It supports the petitioners strictly as a legal matter, urging the Justices that peaceable, nonviolent direct action—that is, peaceful civil resistance which "crosses the line" and may involve sit-ins or blocking access in a manner that might be regarded as a "threat" to property rights should not be held to constitute the federal felony punished by the Hobbs Act, without any proof of robbery or extortion. Nor should a ""pattern" of such "direct action" "be penalized under the federal racketeering laws.

The Conference of Major Superiors of Men serves the leadership of Catholic orders of over 25,000 vowed religious priests and brothers in the United States. The Justice and Peace Division provides a voice for these communities throughout society in witnessing against capital punishment, war, poverty, and any issue that threatens life. The civil rights

of free speech and assembly are crucial to effective action against oppression. These civil rights are threatened by the use of the federal racketeering statute against political and religious dissenters.

Democrats for Life of America, with chapters in 19 states, is a political organization that supports Democratic politicians and candidates for public office who are committed to legislative initiatives that will empower women and their children, persons on death row, and the elderly and infirm.

The Eighth Day Center for Justice is a community composed of Catholic sisters, priests, and laity who believe that nonviolent direct action is the backbone of our democracy and the core of the Christian message. For example, some of the healing actions of Jesus on the Sabbath were viewed as a violation of the Torah. Religiously motivated opposition to unjust laws has a long and admirable history, culminating in the Civil Rights Movement and the Movement for Gender Equality in this country, and in the opposition to the assault upon human life in the Nazi regime.

Embrace a Consistent Ethic participates in ongoing peaceful public witness against all forms of taking human life, including opposition to war, capital punishment, euthanasia, abortion, racism and poverty. The members of this community believe that the *NOW vs. Scheidler* litigation interferes with the ability to carry out group/individual conscientious objection, even those actions which would normally be considered within the limits of free speech.

Every Church a Peace Church [ECPC] is an association of churches that adopt nonviolent struggle as their way to pursue justice. For this reason ECPC agrees with the brief filed in this case by the Southern Christian Leadership Conference in the court of appeals that the power to impose treble damage awards upon the petitioners and to enter a nationwide injunction under RICO represents "clear and present danger to

future prospects for the lawful exercise of our liberties, namely, the free exercise of religion, speech, press, or assembly and petition for redress of grievances."

The Faith Community of St. Sabina's in Chicago is a Word-based, Bible teaching church that believes in the power of praise and worship—a spiritual hospital where all are welcome and invited to "taste and see the goodness of the Lord." The members of the Faith Community of St. Sabina's believe that the church is called to be the immune system of the world—fighting off the attacks of Satan, by both prayer and peaceable nonviolent direct action. Thus St. Sabina's has crusaded against a host of social evils.

Feminists for Life of New York is a pro-woman, pro-life organization that advocates for change for women and their children. Some of its members engage in civil disobedience. In the twelve years since its inception, members have worn costumes of the early suffragists, stationing themselves outside of convention centers and libraries, to call attention to issues such as domestic violence, child abuse, and child welfare rights. Like Susan B. Anthony, they have worn gags on their mouths to protest the silencing of women's voices. They participate in a vigil at the Hall of Justice on every second Friday of the month to protest the death penalty.

Franciscan Office of Justice, Peace, and the Integrity of Creation, Santa Barbara Province, practices outreach, advocacy, and education with and on behalf of the friars and those with whom they minister.

Interfaith Worker Justice (IWJ), a national nonprofit organization founded in 1996, educates, organizes and mobilizes the U. S. religious community on issues and campaigns to improve wages, benefits and working conditions for workers, especially low-wage workers. For these reasons, IWJ is concerned about the possible misuse of the fed-

eral racketeering statute (RICO) against workers in a labor organizing context.

The International Brotherhood of Electrical Workers (IBEW) represents approximately 750,000 members who work in a wide variety of fields, including utilities, construction, telecommunications, broadcasting, manufacturing, railroads and government. The IBEW has members in both the United States and Canada and stands out among the American unions in the AFL-CIO because it is among the largest and has members in so many skilled occupations

The International Brotherhood of Teamsters (IBT), with 1.4 million members, is one of the largest labor unions in the world. It is also the most diverse union in the U.S., with affiliated Local Unions in every state. IBT represents members in almost every craft and industry, including transportation (trucking, rail and air), manufacturing, warehousing, distribution, and many public employees. The Union is politically active, represents its members vigorously, and often exercises its rights and the rights of its members to engage in picketing, other economic action, rallies, demonstrations and marches in support of the interests of its members and working men and women generally.

Nevada Desert Experience has since 1983 organized nonviolent civil disobedience at the U.S. nuclear test site in Mercury, Nevada, where tens of thousands of people—including the actor Martin Sheen—have been arrested for trespass in their public protest against weapons of mass destruction.

The Orthodox Peace Fellowship in North America is a community of Eastern Orthodox Christians committed to witnessing for peace in our world: Eastern Orthodox Christianity has for 2000 years affirmed the Sacredness of human life from conception to death. This, we understand, is the

faith of Christ, the apostles, the councils, and the fathers and mothers of the Church. This we must proclaim.

Pax Christi USA is the national Catholic peace movement of 14,000 members who are committed to the gospel imperative of seeking peace through nonviolence. The members of this association promote peace through personal and social transformation. They frequently engage in nonviolent protest of policies that undermine peace and justice.

People for the Ethical Treatment of Animals (PETA), with more than 800,000 members, is the largest animal rights organization in the world. Founded in 1980, PETA is dedicated to establishing and protecting the rights of all animals. PETA operates under the simple principle that animals are not ours to eat, wear, experiment on, or use for entertainment. PETA focuses its attention on the four areas in which the largest numbers of animals suffer the most intensely for the longest periods of time: on factory farms, in laboratories, in the clothing trade, and in the entertainment industry. We also work on a variety of other issues, including the cruel killing of beavers, birds and other "pests," and the abuse of backyard dogs. PETA works through public education, cruelty investigations, research, animal rescue, legislation, special events, celebrity involvement, and protest campaigns.

The Peter Maurin Center in Washington, D.C., was established in 1997. In the words of Peter Maurin, the center seeks to contribute to creating a "society where it is easier to be good." The Center does so in three ways: (1) evangelization in the Catholic Worker tradition through operating the Catholic Worker Bookstore; (2) carrying out the works of mercy through operating a furniture and household goods exchange, whereby people who have more than they need give it to the Center, which distributes it to needy people; and (3) organizing for peace and justice through solidarity with the people of Puerto Rico in their effort to de-colonize, and

specifically to rid themselves of the Navy at Vieques; and (4) through work for the abolition of the death penalty, specifically focusing on the case of Mumia Abu-Jamal. The Center is concerned with the broad and elastic application of the RICO act to dissent and nonviolent protest. The misapplication of the law in this way permits the government to single out and criminalize movements for social change virtually at will. Affording the government power of this nature renders democratic practices timid and superficial and essentially disempowers the People in the political process. To protect popular, and especially unpopular, political expression, these effects of the RICO law need to be nullified.

Plowshares is a coalition of religious believers who seek to enflesh the words of the prophet Isaiah 2:4, "They shall beat their swords into plowshares, and their spears into pruning hooks. Nation shall not take up sword against nation and neither shall they study war anymore." The founders of this movement, Fr. Daniel Berrigan, S.J., his deceased brother Philip Berrigan, and Elizabeth McAlister, were leaders in the opposition to the Vietnam War. From burning draft files to organizing larger civil disobedience actions, they provided the peace movement with a sharp focus. Their actions against militarism and the nuclear arms race continue today. Fr. Berrigan offered a declaration before the district court in this case at the stage when the court was considering the issuance of the nationwide injunction against anyone associated with the Pro-Life Abortion Network [PLAN]. This declaration addresses the severe impact on nonviolent social protest that flows from treating loose associations of antiwar protesters as though they were racketeer-influenced corrupt organizations. Fr. Berrigan and Ms. McAlister join this brief in their individual capacities, as do the following Plowshares Activists: John Dear, S.J., Peter DeMott, Clare Grady, Ellen Grady, Art Laffin, Paul Magno, Patrick O'Neill, and Kathy Boylan Shields. All of these activists have spent many years imprisoned for their nonviolent protest against war.

Sojourners is a Christian ministry whose mission is to proclaim and practice the biblical call to integrate spiritual renewal and social justice. In response to this call, the members of this community offer a vision for faith in public life by: publishing Sojourners magazine, and other resources that address issues of faith, politics, and culture from a biblical perspective; preaching, teaching, organizing, and public witness; nurturing community by people from the various traditions and streams of the church; hosting an annual program of voluntary service for education, ministry, and discipleship. Members of Sojourners seek to be guided in their lives and work by the biblical principles of justice, mercy, and humility.

Vieques Support Committee is an organization that has helped to organize civil disobedience to protest the repeated bombing of Vieques Island in Puerto Rico by the United States Navy.

Witnesses for Reconciliation [WFR] was formerly the Committee of Southern Churchmen that was founded in the 1960's to promote the work and vision of Dr. Martin Luther King, Jr., and to advance his cause of nonviolence. The Committee promoted, participated in, and led marches, sit-ins, boycotts, and the freedom rides. WFR continues to advance the cause of civil and political rights for minorities.

Individuals

David Atwood is the director of the Texas Coalition to Abolish the Death Penalty. This group regularly organizes demonstrations against the death penalty in Texas.

Donald Bauer is a Catholic priest who served as a member of the New York State Labor and Religion Coalition since its inception, and who worked tirelessly for farmworker wage equity and other issues on behalf of the poor. He also was appointed to the Congress on Racial Equality and in both of

these capacities used public witness to educate and challenge the public.

Michael Baxter, C.S.C. is a theology professor at the University of Notre Dame, and the national president of the Catholic Peace Fellowship.

Abe Bonowitz is the director of Citizens United for Alternatives to the Death Penalty [CUADP], a national organization that works to end the death penalty in the United States through aggressive campaigns of public education and the promotion of tactical grassroots activism. On occasion he has engaged in peaceful acts of civil resistance. While CUADP takes no position on the abortion issue, Bonowitz is pro-choice and, therefore, he is in profound disagreement with the petitioners on that issue and deplores the violent tactics that abortion opponents have been known to employ. He does not know these petitioners and has no personal knowledge of their tactics. He is informed, though, that jurors at the trial of this case found petitioners or unidentified persons "associated with" them responsible for four acts or threats against persons or property. He supports this appeal only because, as a legal matter, political protest involving sit-ins or blocking access should not be condemned as "extortion" or " racketeering."

Roy Bourgeois, M.M., is a Maryknoll priest who, after years as a foreign missionary in Central America, founded the School of the Americas Watch [SOAW], a loose coalition of citizens concerned about the widespread abuse of human rights—including torture and murder of religious leaders and labor leaders throughout Central and South America—by foreign military officers who study at the U.S. Army School of the Americas at Ft. Benning, Georgia. Eric LeCompte is the director of programming of SOAW. Each November—on the anniversary of the assassination of six Jesuit priests and their domestic workers in San Salvador by graduates of the School of the Americas—SOAW organizes a major demon-

stration at Ft. Benning against the negative effects of this program upon peace and justice in our hemisphere.

Bernard Broussard is the founder of the Human Relations Council of Louisiana, a group that played a leading role in community organization on behalf of the civil rights of African Americans in Louisiana in the mid 1960s. From that time to the present, he continues to challenge through marches, demonstrations, holding prayer meetings on behalf of the oppressed in the South. He is a founder of Star-throwers, a human rights organization based in Louisiana.

Will Davis Campbell is a writer, lecturer, and long time supporter of the Civil Rights Movement who helped escort African-American children when they tried to integrate a Little Rock, Arkansas high school back in 1957. A founding member of Dr. King's Southern Christian Leadership Conference, he became the Executive Director of the Committee for Southern Churchmen, which is now known as Witnesses for Reconciliation.

Thomas Cornell is the founder of the Catholic Peace Fellowship and an ordained deacon in the Catholic Church. He is the editor of *The Catholic Worker*, a newspaper of national circulation founded by Dorothy Day, and he lives at the Catholic Worker farm in Marlboro, New York.

John Dear, S.J., has written over 100 articles on peace and nonviolent action Fr. Dear's writings focus on nonviolence and peacemaking. One of his books, *Peacemaking Behind Bars*, is an account of his time spent in jail for a 1993 action at Seymour Johnson Air Force Base in Goldsboro, N.C. He has participated in many other actions of nonviolent civil disobedience for justice and peace.

Stephen Dear is the executive director of People of Faith Against the Death Penalty, a national organization with headquarters in Carrboro, North Carolina.

Richard Deats is the editor of Fellowship Magazine, the publication of the Fellowship of Reconciliation [FOR], the largest, oldest interfaith peace organization in the United States. Since 1915 FOR has carried on programs and educational projects concerned with domestic and international peace and justice, nonviolent alternatives to conflict, and the rights of conscience. FOR promotes nonviolence and has members from many religious and ethnic traditions. It is a part of the International Fellowship of Reconciliation, which has affiliates in over 40 countries. FOR was instrumental, maybe critical, in bringing the Gandhian theory of nonviolent activism into play during the Civil Rights Revolution.

Jim and Shelley Douglass are co-founders of Mary House, Catholic Workers, in Birmingham, Alabama, peace activists, co-founders of Ground Zero Center for Nonviolent Action, and co-organizers of a national campaign to stop the "White Trains" transporting nuclear weapons across the U.S. and to stop the Trident nuclear submarine and missile system. The Douglasses believe that every nonviolent movement in U.S. history could have been squelched by the way in which RICO has been applied in *NOW v. Scheidler*.

Mary Anne Flores, Clare Grady, and Jessica Stewart are members of the Ithaca Peace Community, a group that expresses concern about social justice issues and facilitates the representation of those who would otherwise remain voiceless and unheard in our society. These three women have engaged in nonviolent direct action that has led to their arrest for trespass upon government property. For example, they have served sentences for trespass at the Hancock Airfield in Syracuse, NY, in order to protest the bombing of the people of Iraq.

Thomas Gumbleton is a Catholic bishop in the Archdiocese of Detroit, Michigan, and a founder of Pax Christi, USA. He was a leading voice urging the United States Conference of Catholic Bishops to issue its statement in 1971 collectively

opposing the Vietnam War on the ground that the war could no longer be justified under the principles of the just war tradition. Bishop Gumbleton has worked and visited in poor and war-torn countries in Latin America and the Caribbean and is deeply concerned with human rights violations around the world. He holds a deep belief in the power of nonviolence to effect social change.

Kathy Kelly is a co-founder of Voices in the Wilderness, a group that has sought to end the economic sanctions against the people of Iraq, by sending delegations to Iraq to break the siege and to bring desperately needed medical supplies to children and families, and by sponsoring demonstrations against these sanctions, including week-long fasting outside the headquarters of the United Nations in New York. Voices in the Wilderness has also protested against the current war in Iraq. The American Friends Service Committee nominated Ms. Kelly for the Nobel Peace Prize.

Andy Lipscomb is a member of Witnesses for Reconciliation, a board member of the Seamless Garment Network, and a long-time activist for civil rights.

Deborah McEvoy is a member of Feminists for Life of America and of the Detroit Peace Community. In her role as a health professional, she supports the needs of women and their children through petitions, public advocacy and demonstrations.

Rachel MacNair, a Quaker, is the founder and director of the Feminism and Nonviolence Studies Association. She has written a seminal book on peace psychology, and has been arrested frequently for participation in nonviolent direct actions at nuclear weapons facilities and abortion clinics.

John W. Oliver is the coordinator of the Orthodox Peace Fellowship in North America. He is professor emeritus of history at Malone College.

Gail Phares is a founder of Witness for Peace [WFP] a national organization working to affect U.S. policy in Latin America. Ms. Phares is also the founder and director of the Carolina Interfaith Task Force on Central America. She has led many delegations to war-torn areas in Latin America and frequently joins nonviolent peace and justice actions at home. The members of WFP believe that organizing for justice—including the right to nonviolent protest of official policies of our government—is a fundamental right secured under the Constitution.

Michael Pfleger is Pastor of the Faith Community of St. Sabina's on Chicago's South Side, a "Pastor, Preacher, Parent, Lecturer, Activist, and 'Errand Boy for Jesus,' " who has mobilized his parish and community in a series of protest crusades, sometimes involving peaceable nonviolent direct action, including campaigns against drug paraphernalia (which precipitated statewide legislation), "Standing Up—Talking Back," a social action crusade, an anti-Alcohol & Tobacco Billboard campaign which reduced the number of such billboards from 118 to 40 in the local community, and sting operations to identify vendors selling liquor to minors. On April 27, 1998, citing the verdict in *NOW vs. Scheidler*, the Chicago Sun-Times editorialized that, if RICO weren't curtailed, that statute might even be invoked to deter or punish Fr. Pfleger's and St. Sabina's community-based protest against the trivialization of violence on the Jerry Springer TV show.

Sister Helen Prejean, CSJ, is internationally known for her opposition to the death penalty and her work with both death row inmates and the families of murder victims. She is the founder of Survive, a New Orleans victim's advocacy group, and the author of *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*, which became both a national and international bestseller and a major motion picture. Sister Helen does not believe that peaceful, non-

violent protesters should be condemned as "extortionists" or protest leaders prosecuted as "racketeers."

Scott and Claire Schaeffer-Duffy are co-founders of the Saints Francis and Therese Catholic Worker in Worcester, MA, a lay Catholic pacifist community which offers hospitality to homeless men and women. They also publish *The Catholic Radical*, a bi-monthly journal of opinion. Scott has engaged in civil disobedience at weapons facilities and abortion clinics, and has lectured extensively at colleges and universities throughout New England on the value of nonviolent direct action. The Schaeffer-Duffys state their interest in this case as follows: "Nonviolent civil disobedience is an American tradition, one that has brought much good to our country. We advocate its use when laws contradict the needs of the common good and the greater law of God's love for all."

Martin Sheen is an actor who has participated for nearly two decades in protests against weapons of mass destruction and in demonstrations pertaining to homelessness and other issues of social justice.

John Stoner is a member of Mennonite Central Committee, a traditional peace church. He is the founder of Every Church a Peace Church, a movement to share the convictions of the Anabaptist community with all other Christian churches.

Brian Terrell is a leader of the Catholic Peace Ministry in Des Moines, Iowa and is a participant with members of the Des Moines Catholic Worker community in nonviolent Gandhian activism at Offutt Airforce Base.

Howard Zinn is a professor of history at Boston University. He has served as a professor of history at Spelman College in Atlanta, and as a visiting professor at the University of Paris and the University of Bologna. He has written over a dozen books which deal in some way with protest movements in American history. Two of these books most closely related to

the theme of this brief are *Disobedience and Democracy* (1968), and *A People's History of the United States* (3d ed. 1999).

Stephen Zunes is a Professor of Political Science at the University of San Francisco. He is the principal editor of Nonviolent Social Movements (Blackwell, 1999). His research interests have included the impact of grassroots political movements on policy and government. Prior to his academic career, he engaged in nonviolent civil disobedience campaigns against nuclear power, nuclear weapons and apartheid and served as a staff member and nonviolence trainer for organizations supporting nonviolent civil disobedience.

(12) (10)

Nos. 04-1244 and 04-1352

Supreme Court, U.S.
FILED
SEP 2 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, and THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Respondents.

OPERATION RESCUE,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF CONSISTENT LIFE, THE CATHOLIC-LABOR NETWORK, CITIZENS UNITED FOR ALTERNATIVES TO THE DEATH PENALTY, THE CONFERENCE OF MAJOR SUPERIORS OF MEN, INTERFAITH WORKER JUSTICE, THE LEADERSHIP CONFERENCE OF WOMEN RELIGIOUS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, SOJOURNERS, DANIEL BERRIGIAN, WILL DAVIS CAMPBELL, CAROL CROSSED, THOMAS GUMBLETON, KATHY KELLY, RACHEL MACNAIR, HELEN PREJEAN, MARTIN SHEEN, HOWARD ZINN, STEPHEN ZUNES *ET AL* IN SUPPORT OF PETITIONERS

EDWARD MCGLYNN GAFFNEY, JR.
Counsel of Record
Valparaiso University School of Law
656 S. Greenwich Street
Valparaiso, IN 46383
(219) 465-7860

[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

JOSEPH MATHIAS COSGROVE
Counsel for Martin Sheen
1460 Wyoming Avenue
Forty Fort, PA 18704
(570) 823-9078

JEFFREY S. KERR
General Counsel
People for the Ethical
Treatment of Animals, Inc.
501 Font Street
Norfolk VA 23510
(757) 622-7382

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Hobbs Act and RICO should not be misused against civil rights protesters by their political adversaries	4
A. "Uninhibited, robust, and wide open" speech on public issues leads frequently to many forms of protected communicative activity, including leafleting, picketing, demonstrations, sit-downs, sit-ins, and boycotts	4
B. First Amendment concerns about the demonstrations at issue in this case require the "precision of regulation" mandated in *Claiborne Hardware* (1982), not the sweeping national injunction authorized under *Milk Wagon Drivers* (1941)	9
C. The practical effect of the interpretation of the Hobbs Act by the court of appeals is to sideline or trivialize the very crimes—robbery and extortion—that Congress deliberately inserted into the statute, and to federalize the very crime—coercion—that Congress deliberately excluded from the statute	16
D. Congress never intended RICO to apply to civil protesters	19

TABLE OF CONTENTS—Continued

		Page
II.	The interpretation of the Hobbs Act by the court of appeals is irreconcilable with the structure of the United States Constitution and with American constitutional history	21
	A. We, the People, retain the right to engage in vigorous protest against governmental policies	21
	B. The lower court's view of the Hobbs Act and RICO is irreconcilable with the long history of social protest in this country	24
III.	The court of appeals improperly perpetuated a nationwide injunction against unpopular civil protesters for a full two years after this Court had ordered the injunction vacated	26
	A. "The injunction must necessarily be vacated."	26
	B. Enough is enough	29
CONCLUSION		30
APPENDIX A		1a

TABLE OF AUTHORITIES

CASES	Page
AFL v. Swing, 312 U.S. 321 (1941)	11
Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987)	17
Baltimore & Ohio R.R. v. *United States*, 279 U.S. 781, 785 (1929)	30
Brown v. Board of Education, 349 U.S. 294 (1955)	27
Cafeteria Employees Union Local 302 v. Angelos, 320 U.S. 293 (1943)	11
Carroll v. Princess Anne, 393 U.S. 175 (1968)	11, 12, 27
Garner v. Louisiana, 368 U.S. 157 (1961)	12
Green v. School Bd., 391 U.S. 430 (1968)	27, 30
Hague v. CIO, 307 U.S. 496 (1939)	6
Healy v. James, 408 U.S. 169 (1972)	15
Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287 (1941)	11, 12, 13
Missouri v. National Organization for Women, 620 F.2d 1301 (C.A. 8 1980), *cert. denied*, 449 U.S. 842 (1980)	6, 12
NAACP v. Claiborne Hardware, 458 U.S. 886 (1982)	4, 9, 10, 11, 12, 13, 14, 15
New York Times Co. v. United States, 403 U.S. 713 (1971)	28
Niemotko v. Maryland, 340 U.S. 268 (1951)	6
Planned Parenthood v. Casey, 505 U.S. 832 (1992)	22
Reynolds v. United States, 98 U.S. 145 (1879)	6
Roe v. Wade, 410 U.S. 113 (1973)	7, 22-23
In re Sanford Fork & Tool Co., 160 U.S. 247 (1895)	30
Scheidler v. NOW, 537 U.S. 393 (2003)	14, 17, 18, 19, 23, 28
Sherbert v. Verner, 374 U.S. 398 (1963)	6

TABLE OF AUTHORITIES—Continued

	Page
Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965)	12
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)	6, 12
Teamsters Local 796 v. Newell, 356 U.S. 341 (1958)	11
Terminiello v. City of Chicago, 337 U.S. 1 (1949)	6
United States v. Robel, 389 U.S. 258, 265 (1967)	15
Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957)	11
STATUTES	
Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248	28
Hobbs Act, 18 U.S.C. § 1951(a)	*passim*
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968	*passim*
OTHER AUTHORITIES	
Brief *Amici Curiae* of the American Civil Liberties Union and the National Organization for Women, in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) (Dec. 24, 1981) O.T. 1981, No. 81-202	4, 7-8, 12, 13, 14, 16
Taylor Branch, *Parting the Waters* (1988)	26
Brian Murray, "Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms," 75 NOTRE DAME L. REV. 691 (1999)	20
John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (1998)	6

BRIEF *AMICUS CURIAE* OF CONSISTENT LIFE, *et al.*

INTEREST OF *AMICI CURIAE*

Amici [1] are civil rights organizations, environmentalists, animal protection advocates, political groups, groups supporting organized labor, voluntary associations or persons who (1) are committed to principles of nonviolent direct action on a wide range of social issues, (2) do not condone the use of violence as a legitimate form of social protest, and (3) do not necessarily agree with the substantive views of the petitioners about abortion (some do, some don't, and some take no position).

Each of these aspects about the *amici* merits further elaboration. On the first and second points, we repeat that we do not engage in violence or encourage others to do so. Although *amici* are aware that allegations of violence of varying degrees have arisen in this litigation, we do not condone such violence in any way, but participate in this brief due to our deep concerns over the legal issues that have arisen.

The lead organization—Consistent Life—is a network that promotes a consistent life ethic, focusing on connections among many issues concerning human life, including war, abortion, poverty, racism, the death penalty and euthanasia, and repudiates all forms of violence. Some of the *amici* organizations focus their energies on one or another issue without taking a stand on all other issues. For example, Citizens United for Alternatives to the Death Penalty focuses on capital punishment and does not have an official policy on animal rights. People for the Ethical Treatment of Animals focuses on the view that "animals are not ours to eat, wear, experiment on, or use for entertainment," but does not espouse a view about the death penalty.

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

On the third point it is enough to say that although some of us disagree strongly with the substantive views of the petitioners about abortion or with the methods they employed in the 1980s to demonstrate their opposition to abortion, all of us disagree with the respondents' litigation strategy of reliance upon civil RICO against civil protesters. *Amici* are interested in a prompt disposition of this case because the misapplication of the federal Racketeer Influenced and Corrupt Organizations Act [RICO] exposes us to enterprise liability with staggering penalties (treble damages, attorney fees, nationwide injunctions of long duration) whenever two of more *supporters* of any of the organizational *amici* (who need not be members of the sponsoring body or community) act in a manner deemed by a federal judge to constitute "acts or threats of physical violence to any person or property." Pet. App. 28a.

The lower court's misreading of the Hobbs Act places all social protesters in grave financial jeopardy if any of their supporters engage in conduct vaguely defined as a "threat to property affecting interstate commerce." Judicial imposition of vicarious liability because of the acts of loosely connected supporters of various causes is at odds with the text of both the Hobbs Act and RICO, the history surrounding the adoption of these statutes, and the broader social history of uninhibited protest in this country.

The novel reading of the Hobbs Act offered by the court of appeals—that the statute does not require any proof of either robbery or extortion, the two crimes specified in the Hobbs Act—represents a profound threat to Americans who love this country enough to want to change social policies they deem to fall short of the capacity of our society for human compassion and social justice.

SUMMARY OF ARGUMENT

Judicial imposition of vicarious liability because of the acts of loosely connected supporters of various causes is at odds with the *text* of both the Hobbs Act, 18 U.S.C. § 1951(a), and

the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, and the *legislative history* surrounding the adoption of these statutes. Neither statute should be misused against political and labor protesters.

The misreading of the Hobbs Act by the court of appeals—effectively rewriting the statute to delete the two crimes specified in the text, *robbery* and *extortion*—places all social protesters in grave financial jeopardy if any of their supporters engage in conduct vaguely defined as a "threat to property affecting interstate commerce." This unfounded interpretation is wrong for another reason: it leaves the statute sounding like the federalization of the crime of *coercion*, which is precisely what Congress chose *not* to do when it enacted the Hobbs Act.

In addition to being wrong in its reading of the Hobbs Act, the court of appeals was also wrong in applying RICO to civil protesters, a result never intended by Congress. The Court need not review the entire legislative history of RICO to search for isolated sentences in a committee report or a floor debate. It is enough to look carefully at the *text of the statute*, and compare it with the preexisting bill to recognize that the law signed by President Nixon by no means sought to sweep civil protesters within its scope.

The broader *social history* of uninhibited protest in this country confirms this view of the Hobbs Act and RICO as well. This history confirms that the People retain the right to engage in vigorous protest against a wide variety of governmental policies, and in a variety of forms of direct action, including leafleting, demonstrations, picketing, sit-downs, sit-ins, and boycotts. Real struggles in our past could have had a very different outcome if the novel interpretation of the Hobbs Act and RICO had been around when these events occurred.

The reading of the Hobbs Act offered by the court of appeals represents a profound threat to Americans who love this country well enough to confront social policies they

deem to fall far short of the capacity of our society for human compassion and social justice.

ARGUMENT

I. The Hobbs Act and RICO should not be misused against civil rights protesters by their political adversaries.

A. "Uninhibited, robust and wide open" speech on public issues leads frequently to many forms of protected communicative activity, including leafleting, picketing, demonstrations, sit-downs, sit-ins, and boycotts.

After nearly two decades of litigation related to one of the most contentious issues in our society, the parties before the Court might be imagined to share little common ground. But the truth is that they share much in common. The abortion issue that divides them is a profound disagreement, one that both sides take with great seriousness. The three points we discuss below are all profound truths, and we think it significant that petitioners and respondents agree about these truths. Hence, before turning to matters in contention, we emphasize at the outset the things that unite the petitioners and respondents.

First, both parties believe that *the life of the mind cannot be stifled or controlled by politicians*. For example, NOW argued in a brief *amicus curiae* filed in this Court in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982): "Protection of Political Speech and Association Is Central to the First Amendment." O.T. 1981, No. 81-202, Brief *Amici Curiae* of the American Civil Liberties Union and the National Organization for Women, (hereafter: "NOW *Amicus* Brief in *Claiborne Hardware*"), 1981 WL 390220. We offer two examples from American history of the illusory character of any system of attempted thought control. First, King George III and his Parliament could not satisfy the yearning of the American colonists for self-governance by telling them that they should be content with the idea of "virtual representation," or that they should put all thought of rebellion out of their mind. From the period of the Stamp Act to the founding of the republic, our colonial forebears understood that taxation without representation is tyranny, and when the time came to declare their independence from the mother country, they stated candid reasons that impelled them to the separation, producing the most famous list of grievances in the eighteenth century, the Declaration of Independence. 1 Stat. 1 (1776). Second, the men who governed this country from the dawn of the republic were equally unpersuasive when they told women that they should be satisfied with the political arrangements in this country at the outset because the men provided "virtual representation" for the women. If women were content with this way of thinking, they would still not be voting or serving in public office or on this Court or on juries throughout the land. The reality is that from the founding period to the present, women have known that virtual representation" of women by men is as illegitimate as virtual representation of the colonists by their imperial superiors in Westminster. And when in 1848 American women organized collectively to share their convictions about their experience as a colonized people, they articulated the most famous nineteenth-century list of women's grievances known as the Declaration of Sentiments of Seneca Falls. Both of these examples illustrate that thought cannot be controlled. The life of the mind cannot be contained. Freedom of speech matters. Both petitioners and respondents subscribe to these fundamental propositions about civil liberty.

Second, both sides agree that *it is not enough to protect only the life of the mind, or only "pure speech."* Ideas have consequences. They can trouble people's consciences, awaken an awareness, and become a clarion call to action. Hence it is not enough in a free republic that ideas alone or "pure speech" alone must be protected. It is also necessary to protect communicative action. The text of the First Amendment itself acknowledges this by expressly securing the

natural right of the people not only to freedom of speech, but also freedom to assemble peaceably. The same amendment protects the free *exercise* of religion, which James Madison understood to be profoundly different from mere toleration of the theological ideas of dissenters. *See, e.g.*, John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (1998). Just as this Court has overcome the false start in earlier free exercise cases that divided religious belief and action too categorically, *compare* e.g., *Reynolds v. United States*, 98 U.S. 145 (1879), with *Sherbert v. Verner,* 374 U.S. 398 (1963), so too it has clarified in a host of cases that the Free Speech Clause protects not only utterance itself, but also a wide variety of communicative acts, such as leafleting, picketing, demonstrations, sit-downs, sit-ins, and boycotts. *See, e.g., Hague v. CIO,* 307 U.S. 496 (1939); *Terminiello v. City of Chicago,* 337 U.S. 1 (1949); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

Third, both sides not only agree with these ideas. They *both put these ideas into practice regularly*. For example, NOW testifies regularly before Congress and State legislatures on issues important to its constituents, and has for decades engaged in a variety of public expressive acts such as marches, demonstrations, and boycotts. While the Equal Rights Amendment was pending, NOW organized a nationwide boycott involving several hundred church groups, professional associations, women's organizations, and civil rights groups that agreed not to hold their meetings or conventions in states that had not ratified the proposed amendment. Two state attorneys general sued NOW, seeking declaratory and injunctive relief against the organization for its role in promoting the "ERA boycott." NOW successfully defended the right to engage in such activity. *Missouri v. National Organization for Women*, 620 F.2d 1301 (C.A. 8 1980), *cert. denied*, 449 U.S. 842 (1980). Similarly, the petitioners are not content to leave their ideas about abortion at a purely theoreti-

cal level, but take their convictions to the public through participating in an annual march and demonstration on January 22, the anniversary of this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). And in the early 1980s they formed the "Pro-Life Action Network" (PLAN), a loosely organized coalition of persons, many of whom participated in the demonstrations in front of abortion clinics that are the underlying subject of this litigation.

Like petitioners and respondents, *amici* are divided over the abortion issue. Like them, we are in complete agreement with one another and with the parties about the three points discussed above. We could find no better way to underscore this accord than by stating our agreement with the following propositions articulated by NOW as the headings in the *amicus* brief that it submitted to this Court in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982):

I. A Civil Rights Boycott Is At the Core of First Amendment Protection.

A. A Civil Rights Boycott Is A Form of Political Speech and Association.

B. Protection of Political Speech and Association Is Central to the First Amendment.

II. Civil Rights Boycotts Should Not Be Judged as Common Law Conspiracies.

A. Imposing Liability On An Individual Solely Because of Political Association With Others Violates the First Amendment.

B. An Injunction That Prohibits Advocacy and Picketing Is An Impermissible Prior Restraint and An Unconstitutionally Overbroad, Content-Based Restriction on Speech.

C. The *Meadowmoor* Case No Longer Expresses a Constitutionally Viable Principle.

III. Illegal Conduct By Boycott Participants Can Be Controlled Under Traditional Common-Law Principles of Personal Responsibility Without Employing The Conspiracy Doctrine.

IV. Limiting the Power of A State To Suppress Civil Rights Boycotts Is Not Inconsistent With the Principle That Federal Civil Rights Laws and Remedies Should Be Broadly Construed.

NOW *Amicus* Brief in *Claiborne Hardware*, 1981 WL 390220.

From our perspective as activists on a host of contentious issues in America, these principles articulated by NOW in 1981 seem preferable to the strategies later adopted by the respondents in this litigation with the petitioners.

Finally, we are acutely aware that this case involves allegations of violence. We have already indicated our views on this matter in the statement of interest, and several *amici* do so with greater specificity in their statements in Appendix A. But it bears repetition that *amici* are united in our commitment to principles of nonviolent direct action on a wide range of social issues and in our resolve not to encourage or condone the use of violence as a legitimate form of social protest.

We take this moral stand for two reasons. First, we realize that direct action is often necessary to awaken the conscience of the nation to injustice within our society. For example, the abolitionists did so for three decades prior to the Civil War. Women were a prominent part of that movement, and had to sustain their own movement of direct action to awaken our country to the injustice of excluding women from voice or vote. Even though emancipated, African Americans endured a brutal pattern of systematic discrimination in housing, employment, schooling, and the franchise; and they undertook a massive campaign of direct action to overcome these injustices. Even enfranchised, women were still subjected to unequal treatment in the laws and policies of the nation; and they undertook a massive campaign of direct action to overcome these injustices.

Second, we have been shaped by the commitment to Gandhian nonviolence preached and practiced by Dr. Martin

Luther King, Jr., the principal leader of the movement to end legalized apartheid in this country. Some of the *amici* are civil rights activists from that era. For example, Will Davis Campbell was a founding member of Dr. King's Southern Christian Leadership Conference; Dr. Campbell served as the Executive Director of the Committee for Southern Churchmen, now known as Witnesses for Reconciliation. Others bore the brunt of the violence of arch-segregationists like Bull Connor and Governors George Corey Wallace and Orval Faubus. These heroes of the civil rights movement sang "We shall overcome," and they did overcome the violence of racism by nonviolence.

B. First Amendment concerns about the demonstrations at issue in this case require the "precision of regulation" mandated in *Claiborne Hardware* (1982), not the sweeping national injunction authorized under *Milk Wagon Drivers* (1941).

The general commitment to nonviolence referred to above in Part I.A did not guarantee there never were any instances in which civil rights protesters threatened violence or resorted to it. On the contrary, that very fact pattern was the subject of a ruling by this Court that is highly relevant to this case, *NAACP v. Claiborne Hardware,* 458 U.S. 886 (1982). These were the facts. In 1966, a branch of the NAACP in Claiborne County, Mississippi, launched a boycott of local white merchants "to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice." *Id.* at 907. The record in this case contains abundant evidence of pure speech ("encouraging nonparticipants to join the common cause") and clearly protected activity ("nonviolent picketing"). The complexity of the case is reflected in clear evidence that fear of reprisals caused some black citizens to withhold their patronage from the boycotted businesses. This led the state supreme court to rule that the entire boycott was unlawful and

that each of the named defendants was liable for all of its economic consequences. *Id.* at 888.

This Court was persuaded that the critical factors in the boycott's success were "persuasive rhetoric, determination to remedy past injustices, and a host of voluntary decisions by free citizens." *Id.* As to the violence in the record, Justice Stevens noted: "Although the extent and significance of the violence in this case are vigorously disputed by the parties, there is no question that acts of violence occurred. No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence." *Id.* at 916.

Thus, *Claiborne Hardware* states clearly that violence is not constitutionally protected. None of the *amici* claims that violence in protesting abortion or any other issue on which we sometimes take to the street in protest is constitutionally protected. On the contrary, we go further than the constitutional distinctions and declare unambiguously that *violence against women seeking an abortion or those providing them is itself morally repugnant to us*, an offense we do not condone. But the principal focus of our concern in this litigation is that the legal tool selected by respondents—civil RICO (conspiracy theory writ large)—is problematic for all protesters of all stripes on issues of all sorts, especially as this statute has been construed by the court of appeals to lack any requirement of proof of either robbery or extortion.

Hence we return to *Claiborne Hardware*, noting important factual parallels between that precedent and the instant case. First, although the parties in both cases disputed the extent and significance of the violence, there is no question in either case that acts of violence occurred. *Id.* at 916. Second, in both cases, the record does not reflect a *pervasive* pattern of violent acts, but relatively few instances of violence amidst a pattern of predominantly nonviolent protected activity. *Id.* at 923. Third, precisely because in both cases sporadic acts of violence were situated within a broader context of pure

speech and clearly protected activity, both cases require rigorous "precision of regulation." As Justice Stevens clarified: "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *Id.* at 916-917; *see also Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 184 (1968). Hence the Court set clear limits on the imposition of derivative or enterprise liability upon an entire group for the conduct of some members who might have engaged in illegal tactics unauthorized by the organization, while most of the membership remained truly innocent of any illegal acts committed by the organization. *Id.* at 930-932.

At the urging of the respondents, the district court rejected *Claiborne Hardware* as the precedent to follow, and relied instead on an earlier precedent, *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287 (1941). No. 04-1244, 127a-128a. The court of appeals considered *Claiborne Hardware* in passing, *see* No. 04-1444, Pet. App. 48a-49, but the logic of its holding is contrary to this precedent.

The very styling of the 1941 case suffices as a clue that something curious was happening in the selection of which precedent to honor. Milk has not been delivered to homes by wagon drivers in a very long while. It was only *after 1941* that this Court clarified in a host of important decisions that concerted activity such as picketing, sit-downs, and boycotts are protected activity not subject to state injunctions. *See, e.g., AFL v. Swing*, 312 U.S. 321 (1941) (state court injunction against picketing reversed; *Milk Wagon Drivers* distinguished); *Cafeteria Employees Union Local 302 v. Angelos*, 320 U.S. 293 (1943) (state court injunction against picketing reversed; *Milk Wagon Drivers* distinguished); *Teamsters Local 796 v. Newell*, 356 U.S. 341 (1958) (state court injunction against picketing and boycotts issued in reliance upon *Milk Wagon Drivers* reversed *per curiam*); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) (state court injunction against pick-

eting reversed; *Milk Wagon Drivers* distinguished); *Carroll v. Princess Anne, supra* (state court injunction against rallies issued in reliance upon *Milk Wagon Drivers* reversed). By the simple device of electing to "follow" *Milk Wagon Drivers*, the lower courts could proceed apace to ignore all of this Court's teaching in the four decades between the precedents, including cases at the height of the civil rights movement, *see, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), and 382 U.S. 87 (1965), and cases involving trespass by sit-down protesters at segregated lunch counters, *Garner v. Louisiana*, 368 U.S. 157, 185, 201-207 (1961) (Harlan, J. concurring). *See* NOW *Amicus* Brief in *Claiborne Hardware*, 1981 WL 390220, at 19-21.

The most significant reason to distinguish *Milk Wagon Drivers* and *Claiborne Hardware* is not the year in which the Court decided these cases, or even the many subsequent cases in which this Court declined to follow *Milk Wagon Drivers*. It is the profoundly different circumstances or facts in each record. Thus, in *Claiborne Hardware* Justice Stevens distinguished *Milk Wagon Drivers* by citing the following facts from the record in the 1941 case:

> Witnesses testified to more than fifty instances of windowsmashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the vendor system were held with guns and severely beaten about the head while being told 'to join the union'; carloads of men followed vendors' trucks, threatening the drivers, and in one instance shot at the truck and driver. *Claiborne Hardware*, 458 U.S. at 923, citing *Milk Wagon Drivers*, 312 U.S., at 291-292.

Nothing of the magnitude of this level of violent crime can be found in the record of *Claiborne Hardware* or the *Scheidler* case. We repeat, the fact that there is any violence at all in the context of an abortion protest is something that *amici* find morally abhorrent. But, to return to constitutional analysis, we examine the record in this case soberly and find nothing remotely approximating the level of pervasive violence in *Milk Wagon Drivers*.

A corollary of this point is that "insubstantial findings of fact" will not suffice to defeat any constitutional freedom, let alone "the guarantees of the Bill of Rights." *Milk Wagon Drivers*, 312 U.S. at 292. In both *Claiborne Hardware* and the instant case the only evidence of violence refers to a few isolated acts of violence during a limited period in the long years under review. In *Milk Wagon Drivers*, by contrast, there was overwhelming testimony of a much more serious pattern of criminal activity.

In the light of these considerations, can one seriously claim in 2005 that *Milk Wagon Dairies* continues to express a constitutionally viable principle after *Claiborne Hardware*? It is instructive that NOW argued persuasively to the contrary in the *amicus* brief that it filed in this Court in *Claiborne Hardware* "The [*Milk Wagon Drivers v.*] *Meadowmoor* Case No Longer Expresses a Constitutionally Viable Principle." NOW *Amicus* Brief in *Claiborne Hardware*, 1981 WL 390220 at 19. The Court, of course, has ready access to this brief, both in the Library of the Court and on line, 1981 WL 390220. But we include a few samples of its solid reasoning here. For example, NOW argued in its brief: "[*Milk Wagon Drivers*] was decided before the Court had developed the First Amendment principles on which we and the petitioners rely. The Court's holding is, as we urge here, inconsistent with fundamental constitutional principles." *Id.* at 20. "[*Milk Wagon Drivers v.*] *Meadowmoor* no longer reflects current interpretation of the protection to be afforded First Amendment rights, and we urge that it be overruled." *Id.* at 22. We

agree. NOW correctly grasped the complexity of hybrid cases in which protected and unprotected activity coincide in a single record. The principle that NOW articulated in its *amicus* brief in *Claiborne Hardware* is no less valid today, and no less valid in this very case.

At this stage of the lengthy proceedings, the court of appeals has suggested a remand to the district court to ponder four free-floating acts of violence that the court of appeals thinks merit further reflection—though not further fact-finding—by the district court. Pet. App. 2a-6a. This conclusion flies in the face of the clear mandate of this Court in *Scheidler v. NOW*, 537 U.S. 393 (2003) (*Scheidler II*): "Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." 537 U.S. at 411.

Since the court of appeals acknowledged that *Claiborne Hardware* is the more fitting precedent to follow in the *Scheidler* case, Pet. App. 48a, *amici* focus only on whether the lower court actually achieved the "precision of regulation" that *Claiborne Hardware* requires. *Claiborne Hardware* repeatedly states that it is not permissible to identify a few acts or threats of violence, and then assign liability for these acts to people who did not commit them. *See e.g.*, 458 U.S. at 916-917 (presence of protected activity imposes restraints on the grounds that may give rise to liability for damages and on the persons who may be held accountable for those damages); *id.* at 924 (attendance and participation at meetings of civil rights organizations an insufficient basis upon which to impose liability for certain violent acts engaged in by some persons participating in the boycott where no illegal conduct was authorized, ratified, or discussed at any of those meetings); *id.* at 925 (guilt by association is impermissible basis for assigning liability); *id.* at 930-932 (limits on the imposition of derivative or enterprise liability upon an entire group for conduct of

some members who might have engaged in illegal tactics unauthorized by the organization, while most of the membership remained truly innocent of any illegal acts committed by the organization).

The lower courts did not come close to "precision of regulation." For example, the court of appeals sustained the decision of the district court allowing plaintiffs-respondents to introduce before the jury evidence about the conduct of *persons never identified in the trial*. Whoever these parties were, their acts against various abortion providers, Tr. 685, 687, 723, 1148, 1486, 2147-50, over the fourteen years from 1984 to trial were most emphatically *not* the acts of any of the named petitioners. Once one tries to achieve "precision of regulation," serious questions present themselves. Is there *any evidence in this vast record linking any of the named petitioners to any act of coercion or violence*? If there is no reliable factual basis for determining *precisely who* committed those acts of violence or threats of violence that the court of appeals wants the district to think about, how can a court fashion an equitable remedy?

The answer to these questions surely cannot be that the petitioners hung out with one another, for this Court has repeatedly rejected the idea of guilt by association. *See, e.g.*, *Healy v. James*, 408 U.S. 169, 185-186 (1972) the Court (state university may not deny recognition to local student group merely because of affiliation with national organization associated with disruptive and violent campus activity).

In *Claiborne Hardware*, Justice Stevens cited both *Healy*, 408 U.S. at 186, and *United States v. Robel*, 389 U.S. 258, 265 (1967) for the proposition that "'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights. The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." 458 U.S. at

919-920. Analogously, the plaintiff in a civil RICO case has a similar burden. In this litigation respondents did not even attempt to establish specific intent by any specific person to further illegal aims. Contrast this litigation behavior with the convictions of NOW set forth in its *amicus* brief in *Claiborne Hardware*: "Imposing Liability On An Individual Solely Because of Political Association With Others Violates the First Amendment." NOW *Amicus* Brief in *Claiborne Hardware*, 1981 WL 390220, at 12-15.

For these reasons alone, the court of appeals should be reversed. But there are other reasons for reversing the court of appeals that arise from its misreading of both the Hobbs Act and of RICO itself.

C. The practical effect of the interpretation of the Hobbs Act by the court of appeals is to sideline or trivialize the very crimes—robbery and extortion—that Congress deliberately inserted into the statute, and to federalize the very crime—coercion—that Congress deliberately excluded from the statute.

At the conclusion of the trial in this case in 1999, the district court entered judgment for the respondents and shortly thereafter entered a nationwide permanent injunction regulating petitioners' future protest activities at abortion clinics. No 04-1244, Pet. App., 141a-174a. The court of appeals affirmed "in all respects." *Id.* at 61a.

This Court reversed, concluding its opinion on February 26, 2003 with three clear commands: (1) "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed," (2) "the judgment that petitioners violated RICO must also be reversed," and (3) "[w]ithout an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." *Id.* at 411. Those three commands are, of course inter-related. Without *any* predicate acts, the RICO judgment had to fall. And without a final judgment favoring the respondents, the injunction had to be vacated.

See e.g., Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 546, n. 12 (1987).

For these reasons *amici* imagined that the case was over, but we underestimated the capacity of lawyers and judges to extend the life of a case. After pondering the case for a full year, the court of appeals issued an unpublished order remanding the case to the district court to determine whether four unspecified "acts or threats of physical violence to any person or property" are sufficient to support the nationwide injunction it imposed in 1999. No. 04-1244, Pet. App. 25a-29a.

In defending this result, the court of appeals not only ignored this Court's clear mandate, but also indulged more in statutory amendment than in statutory interpretation. The text of the Hobbs Act adopted in 1946 clearly links the federal violation with the common law crimes of robbery and extortion. Section 2 provides: "Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, *by robbery or extortion*, shall be guilty of a felony." Section 5 provides: "Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of section 2* shall be guilty of a felony." Pub. L. No. 486, 60 Stat. 420 (1946) (emphasis added).

This case has never involved any allegation of robbery, for none of the anti-abortion protesters ever *stole* any property from any of the clinics at which they engaged in sit-ins. And the law of the case determined by this Court in *Scheidler v. NOW*, 537 U.S. 393 (2003) (*Scheidler II*), is that this case no longer involves any contention about extortion, for none of the anti-abortion protesters ever *obtained by force or violence* any property from any of the clinics at which they staged protests. Since the two crimes expressly mentioned in the Hobbs Act have no relevance to this case, the Court's concluding paragraph was ineluctable: "Because *all of the predicate acts supporting the jury's finding of a RICO violation*

must be reversed, the judgment that petitioners violated RICO must also be reversed." *Scheidler II*, 537 U.S., at 411 (emphasis added), No. 04-1352, Pet App. 48a.

Nevertheless, on remand the court of appeals held the case for a full year—a long time to ponder a clear mandate—and then took another full year to rule on the petition for rehearing. What emerged from all this judicial deliberation was not the birth of a new legal vision of the relationship of federal and state crimes, nor even a bold statement of how the Hobbs Act must be sensibly construed, but only a meek, iffy supposition that "it is *not beyond the realm of possibility* that the revisers *may have made* certain substantive changes, either advertently or inadvertently."[2] No. 04-1244, Pet. App. 15a.

After all this waiting, the court of appeals directed the district court to consider a novel view of the Hobbs Act that had been rejected by all other circuits that have considered it. *See* No. 04-1244, Pet. 18-22. Judge Wood wrote: "it would be imprudent to resolve this problem of statutory interpretation at this stage" and she elected instead to follow "for reasons of judicial economy and restraint . . . a wait-and-see approach." No. 04-1244, Pet. App., 6a-7a, 15a-16a. "Imprudent"? It is not imprudent; it is impertinent for a lower court to ignore the mandate of this Court. "Judicial economy"? The court of appeals wasted judicial resources by prolonging a case that this Court ended over two years ago. "Restraint"? The court of appeals was unrestrained in page after page attacking the sensible view of the Hobbs Act offered by the petitioners in their briefs below. "Wait-and-see"? This is not a case about the rule against perpetuities; it is a case that misapplies RICO to social protesters.

At the end of the day the court of appeals offered a view of the Hobbs Act that is a mirror image of what Congress enacted. First, Congress expressly *excluded* the crime of *coercion* from the Hobbs Act in 1946, and the court of appeals has effectively read that crime back into the Hobbs Act by suggesting that the statute punishes a free-floating crime of threatening a person engaged in interstate commerce, which sounds pretty much like the crime of *coercion*. Second, Congress expressly *included robbery* and *extortion* in the Hobbs Acts, and the court of appeals rewrote the statute by effectively striking from the statute's "violence provision" any connection to the two crimes that Congress decided to punish as a federal offense. To achieve this remarkable feat of statutory interpretation, the court of appeals simply ignored this Court's clear teaching on this very matter in *Scheidler II*, 537 U.S. at 405. Even more boldly, the court of appeals ignored the clear mandate of this Court in *Scheidler II, id.* at 411, as well as the concerns of Justices Ginsburg and Breyer about the expansive use of RICO, *id.* at 411-12 (Ginsburg, J., concurring).

[2] In the *Ars Poetica*, the ancient Roman poet Horace wrote: "Parturient montes, et nascitur ridiculus mus." ("The mountains are in labor, and a ridiculous mouse is born.")

D. Congress never intended RICO to apply to civil protesters.

In addition to being wrong in its reading of the Hobbs Act, the court of appeals was wrong in applying RICO to civil protesters, a result never intended by Congress. This Court need not review the entire legislative history of RICO to search for isolated sentences in a committee report or a floor debate. It is enough to look carefully at the *text of the statute*, and compare it with the preexisting bill to recognize that the law signed by President Nixon by no means sought to sweep civil protesters within its scope. In 1969 the bill that would eventually become RICO defined "racketeering activity" very broadly to include "any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year." S. 1861, 91st Cong., Section 2(a) (1969). *see also* 115 Cong. Rec. 9569 (1969). Several objected to this language. Note that

this language is very close to the crime of coercion, which Congress had not federalized from the Hobbs Act in 1946.

Several Members of Congress, including Senators Edward Kennedy and Philip Hart complained that the bill reached beyond "organized crime." S. Rep. No. 91-617, at 215 (1969). The American Civil Liberties Union also opposed the bill, expressing the concern that social and political protesters might fall within the bill's ambit. The ACLU found the breadth of the original definition of racketeering activity "particularly troublesome," citing the anti-war demonstrations at the Pentagon and at Columbia University. *Measures Relating to Organized Crime: Hearings on S.30 and Related Measures Before the Subcomm. on Crim. Laws and Proc. of the Senate Comm. on the Judiciary*, 91st Cong. 475-76 (1969). The ACLU feared that this version of the bill would be used by the Nixon Administration to suppress anti-Vietnam war dissent. The Department of Justice also objected to the sweeping definition of "racketeering activity" in the bill, arguing that it was "too broad and would result in a large number of unintended applications." S. Rep. No. 91-617, at 121-22. Deputy Attorney General Richard G. Kleindienst suggested an amendment to narrow the definition to a list of specific offenses "customarily invoked against organized crime." *Id.* at 158.

In response to these misgivings, the Senate Judiciary Committee eliminated the broad language defining "racketeering activity" as "danger of violence to life, limb or property," and replaced it with a list of specifically designated federal and state offenses, such as the Hobbs Act. The new language was virtually identical to that recommended by the Justice Department. The Senate adopted the revised bill by a vote of seventy-three to one. 116 Cong. Rec. 972 (1970). The House then made minor amendments with which the Senate concurred. *Id.* at 36,296. President Nixon signed the bill into law on October 15, 1970. *See* Brian Murray, "Protesters, Extortion, and Coercion: Preventing RICO from Chilling First

Amendment Freedoms," 75 NOTRE DAME L. REV. 691, 697 & n.21 (1999).

As noted above with respect to the Hobbs Act, one of the objectionable features of the opinions of the court of appeals on remand is that three unelected judges have, in effect, assumed functions better left for Congress to undertake. The court of appeals on remand effectively reinstated the arguably unconstitutional broader version of the RICO bill that the Senate expressly rejected. Congress emphatically did not intend RICO to be used as a bludgeon against social protesters, as the lower courts have done not only in this case, but also in other cases directly affecting some of the *amici*. The Court should reinstate a sensible construction of RICO.

II. The interpretation of the Hobbs Act by the court of appeals is irreconcilable with the structure of the United States Constitution and with American constitutional history.

A. We, the People, retain the right to engage in vigorous protest against governmental policies.

The structure of our constitutional order is highly relevant to the proceedings in this case. We, the People ordain and establish the Constitution of the United States. The First Amendment is a mirror image of Article I, §8. In Article I the People confer legislative power upon Congress. In Amendment I the People deny to Congress (and by implication to the Executive and the Judiciary) any power or jurisdiction to establish religion or prohibit its free exercise, or abridge the People's freedom of speech or of the press; or the right of the People peaceably to assemble, and to petition the Government for a redress of grievances.

In times of crisis, the People rather than governmental officials (arresting officers, angry mayors or governors or legislators, even judges who have from time to time yielded to the passion of the day), have often been the moral compass of society. Law has not always been an instrument of establishing justice, but has also become a means of coerced injustice.

Slavery is the most obvious example that was overcome not by the political branches nor by the decisions of this Court, but by a massive popular upheaval sustained for nearly three decades (1830-1860) before the political branches began to respond to the demands of the People to end this inequity. And it took another century after the eradication of slavery to put an end to Jim Crow segregation that made a mockery of this country's commitment to "equal protection of the laws." Again massive popular civil protest—led by African Americans—against the injustice of these laws was the vehicle for the Civil Rights Laws of the 1960s that were the direct fruit of the civil rights movements.

The original Constitution excluded women from full citizenship by denying them the franchise as well as public obligations such as service on juries; and by virtue of laws enacted by all-male legislatures and enforced by all-male courts, the subjugation of women to men lasted throughout the majority of this country's history. As with the civil rights movements, it took two massive popular movements—both led by women—in both the nineteenth and the twentieth centuries to overcome these inequalities. *Amici* note with gratitude the role that respondent National Organization for Women played in helping, prodding when necessary, our society to move in the direction of equal dignity for men and women.

Abortion still divides our country decades after *Roe v. Wade*, 410 U.S. 113 (1973). So is this Court divided, even as it attempts to shore up its own major precedent. *See Planned Parenthood v. Casey*, 505 U.S. 832 (1992) (reaffirming *Roe*). Indeed, some members of this Court have dared to suggest that a significant cause for popular unrest over this issue is the Court's withdrawal of the issue from the political forum where common ground might be sought among contending parties. For example, Justice White wrote: "The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the

continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand." *Roe v. Wade*, 410 U.S. at 221 (1973) (White J., dissenting). *See also* Comments of [then Circuit Judge] Ruth Bader Ginsburg, New York University Law School, 1992.

Amici cannot in this brief suggest a simple way out of the country's anguish over abortion, for we are divided on this issue ourselves. It is equally true that all the *amici* are united in rejecting the solution to this issue represented by this litigation as it has meandered through numerous legal theories—including the view that anti-abortion demonstrators represented a conspiracy in restraint of trade in violation of the Sherman Act, or that petitioners could be linked with deeply disturbing crimes such as intentional murder of doctors who provide abortions or with arson perpetrated at abortion clinics, even though there was no evidence linking any of the defendants (petitioners here) to these crimes, which *amici* repudiate with unanimity and full vigor. In its latter stage, the case has rested upon the federal racketeering law, the application of which to social protesters is a result that Congress never intended when it enacted RICO, and that is nowhere to be found in the statute signed by President Nixon in 1970. *See* Part I.D, above.

This Court has attempted to shed light on RICO twice already. We had thought the second time was the *denouement* of this litigation, since the Court concluded its 8-1 opinion with such a clear mandate: "Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." *Scheidler II*, 537 U.S. at 411.

We hope that this case has now come to its final act. But we are compelled to state that after all these years the case has taken a turn for the worse, when it was difficult for us to

imagine that it was possible after this Court's resolution of the issue of reversing the judgment and vacating the injunction in *Scheidler II*.

That this case has gone on so long is another indicator that something has gone wrong with RICO. As we noted above in Part I.D, Congress did not have people like the petitioners in mind when it enacted RICO. Not to put too fine a point on the matter, we imagine that Congress was taking aim at, well, "racketeer influenced" and highly organized, if thoroughly "corrupt organizations." But to *amici*, most of whom engage regularly in civil protest on a wide variety of issues, and who—like the petitioners—do so in a fairly unorganized and spontaneous way, we think the application of RICO to social protesters is a profound mistake.

Why is the mistake a profound one? We return to the most fundamental truth about our constitutional order stated above: that that People retain the natural rights articulated in the First Amendment, and efforts to stifle these differing points of view—sometimes radically differing—are in the long run fruitless. Worse yet, the involvement of the judiciary in one legal theory after another to wear down the meager resources of civil protesters is itself problematical.

B. The lower court's view of the Hobbs Act and RICO is irreconcilable with the long history of social protest in this country.

People have frequently protested the moral flaws of the law, whether enacted by the people's representatives or pronounced by the judiciary. For this principle of democracy to thrive at a time we are trying to urge greater openness to democracy in other cultures, this society needs to grant breathing space for vigorous social protest. RICO chokes off such protest activity. Freedom cannot flourish with a case that imposes on protesters severe penalties under the federal racketeering laws.

What drives our basic intuition that our view is correct is as much a sense of American history from the underside as a

refined appreciation of this Court's precedents. So we turn to an account of how incompatible this litigation is with our nation's history. Real struggles in our past could have had a very different outcome if the new interpretation of the Hobbs Act and RICO had been around when these events occurred. For example, the participants in the Boston Tea Party not only *threatened property*, but actually pitched taxed tea into Boston harbor. But it was not the crime of robbery or extortion. So we don't recall it as a RICO offense, but as a political act of rebellion against taxation without representation.

The picket line and the economic boycott are tools used by organized labor to persuade owners or managers of corporations to raise wages or provide better benefits. Both picketing and boycott activity intentionally cause economic injury by diminishing the profits of the targeted company. For example, the Reuther brothers led United Auto Workers in a sit-down strike at the Ford plant in 1937. Ford called the strikers "trespassers" and had them arrested on that charge. Whatever offense may have been committed at the Ford plant, it was not the crime of robbery or extortion. So we don't recall it as a RICO offense, but as a famous effort to protect the rights of workers.

If RICO had been on the books back in the 1960s and if the lower court's reading of RICO is right, then Dr. King and the SCLC would have been vulnerable to losing their assets to their arch-segregationist racial-supremacist adversaries. All it would have taken to reach that bizarre result is for a federal judge to have viewed the "trespass" by sit-in protesters at racially segregated lunch counters as a "threat of physical violence" to the property of the Woolworth company by depriving the drugstore of revenues they otherwise would have made. But it was not the crime of robbery or extortion. So we don't recall it as a RICO offense, but as a courageous protest against Apartheid.

Rosa Parks' famous refusal to sit in the back of the bus triggered a year-long, city-wide boycott of the Montgomery

buses led by Dr. Martin Luther King, Jr., which inflicted economic injury on the city by depriving the city of revenues from their segregated buses. But it was not the crime of robbery or extortion. So we don't recail it as a RICO offense, but as one of the great instances that the People *shall overcome*. *See, e.g.*, Martin Luther King, Jr., *Stride Toward Freedom* (1963); Taylor Branch, *Parting the Waters* (1988); Howard Zinn, *A People's History of the United States: 1492—Present* 440-450 (1995).

None of these great Americans should have been forced to endure the expense of protracted litigation as defendants in a RICO action, even if it were eventually dismissed on the ground that the there was no "physical violence," whatever that might mean with respect to property (arson? malicious destruction?).

As a practical matter, moreover, the lower court's reading of the Hobbs Act is impossible for a leader of a protest movement to enforce. It is bound to happen sooner or later that a member of a loosely defined movement may do things that are not authorized by the leadership, especially in the heat of the moment, when tempers and emotions run high.

III. The court of appeals improperly perpetuated a nationwide injunction against unpopular civil protesters for a full two years after this Court had ordered the injunction vacated.

A. "The injunction must necessarily be vacated."

This Court reversed the court of appeals in 2003, noting with respect to the injunction: "Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." *Id.* at 411. On remand the court of appeals considered the case for a full year, and then issued an unpublished order remanding the case to the district court to determine whether four unspecified "acts or threats of physical violence to any person or property" are sufficient to support the nationwide injunction it had imposed in 1999. No. 04-1244, Pet. App. 25a-29a.

Since the parties are briefing the question of whether RICO authorizes private parties to obtain injunctive relief, we offer the Court a perspective on injunctions that comes from the considerable cumulative experience of the *amici* as social activists engaged in civil protest on many contentious and difficult issues.

First, *amici* note the *duration of the injunction*. More than two years after this Court ordered the injunction to be vacated, the injunction in this case is still ongoing. This injunction was ordered against protest activity that happened nearly twenty years ago. It has been in force for nearly six years, and if the lower court is right, it could go on until 2011, another six years. *See* No. 04-1244, Pet. App. 141a-142a. *See Carroll v. Princess Anne*, 393 U.S. 175 (1968) (reversing an *ex parte* temporary restraining order of *ten days*' duration). This Court used the adverb "necessarily" in its order to vacate the injunction, but did not add a specific chronological dimension to its order, such as "with all deliberate speed" or "instanter" or "now." It had no cause to do so in 2003, for the normal assumption would be that compliance with a mandate would be done promptly.

When the Court used the phrase "with all deliberate speed," *Brown v. Board of Education*, 349 U.S. 294, 301 (1955), it intuited that the subject of its order—racial desegregation of public schools—would take time to achieve, and it intentionally left to the district courts the task of devising desegregation plans in their region of the country. The order in the instant case, however, was not to begin to devise plans for "the dismantling of well-entrenched dual [school] systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution." *Green v. School Bd.*, 391 U.S. 430, 439 (1968). It was simply to dissolve an injunction that no longer had any legal basis. To vacate the injunction in this case does not take much time. It only takes the humility to follow a direct order from this Court. After a

decade of foot-dragging by local officials in Virginia, this Court amended the ambiguous term "with all deliberate speed" to the direct and simple term "now." *Green, id.* Now is the moment for the Court to use the same adverb in this case. The injunction should be vacated *now*.

When First Amendment rights are implicated, this Court has given explicit directions for the speed with which it expects its mandates to be complied with. *See, e.g., New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) ("The judgments shall issue forthwith."); *id.* at 715 (Black, J., concurring) ("every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.").

Second, even if this Court had not ruled with clarity about the nationwide injunction in this case, protest activity in front of abortion clinics is now governed by the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248. *See also Scheidler II*, 537 U.S., at 411, (Ginsburg, J., concurring), No. 04-1352, Pet App. 48a. This statute was enacted because Attorney General Reno and the Attorneys General of several states took the view that no federal law—including the Hobbs Act and RICO—afforded any protection to abortion clinics under the circumstances of protests in front of clinics at the time.

Third, *amici* have considerable experience with public demonstrations of popular dissent from controversial policies. For example, Fort Benning, Georgia, houses a program called the School of the Americas, a training center for foreign military and security officials. The program has included training in the use of torture. Prominent alumni of this program have been engaged in death squads for decades. They include assassins of Archbishop Oscar Romero and of six Jesuit priests and their housekeepers in El Salvador. Each year in November a large group of Americans, including several of the *amici*, protest against this program. If demonstrators cross onto the base, they are apprehended by federal authorities, and are punished for trespassing on federal property, with prison sentences up to six months, and fines of up to $5,000. For example, in November of 2004 Sister Lil Mattingly, an elderly nun, was among those who crossed onto the base; despite her age, she received the maximum sentence of six months incarceration for daring to demonstrate against a policy hard to reconcile with fundamental decency and with this country's commitment to international humanitarian law specified in treaties and covenants to which this nation is a high contracting party. During the past fourteen years in which this demonstration has been occurring, over 180 people have been sentenced to prison, totaling 81 years in prison. These sentences seem excessive when compared with typical sentences for trespassing under state law. Imagine the impact of the decision below, if the Government could add to its arsenal against nonviolent demonstrators the full range of criminal penalties under the Hobbs Act (up to 20 years in prison), with no duty upon the Government to show that a "threat of physical violence to . . . property" was achieved *by robbery or extortion*.

Finally, the decision by the court of appeals to ignore the order of this Court to vacate the injunction in this case could embolden judges who are so minded to issue excessive injunctive relief when they should be thinking instead of preserving the fragile ability of the People to bring their government back to decency and sanity.

B. Enough is enough.

As a practical matter, there must be some finality to litigation. *Amici* are activists who may not be able to define with precision the point when finality is or should be reached. But two decades of litigation seems more than enough time for parties to be wrangling in court over the application of RICO to civil protest.

In its most recent order, the court of appeals assures the parties that it does not mean to "open Pandora's Box," but "merely resolves the final loose ends in this long-running litigation." No. 04-1244, Pet. App. 16a. But this Court al-

ready resolved all the "loose ends" of this litigation in 2003. The court of appeals has needlessly prolonged the case for two years, and has proposed a recipe for further delay by remanding to the district court to decide among various competing views on how to read the Hobbs Act. And it did so after strongly suggesting that a Hobbs Act violation can occur without robbery or extortion, a view plainly at odds with other circuits that have considered this question. *See* No. 04-1244, Pet. 18-22.

Most of the *amici* who join this brief also joined the briefs filed in the October 2001 Term. Few of the *amici* are lawyers familiar with the intricacies of distinguishing precedents and construing statutes. But all of us marveled at the ingenuity with which a lower court could, in effect, reverse this Court. *See, e.g., In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *Baltimore & Ohio R.R.* v. *United States*, 279 U.S. 781, 785 (1929). When asked to consider joining another brief this Term on the same matter in the same case, most of the *amici* spontaneously observed that *endless litigation eats up the meager resources of people who espouse unpopular views.*

We now say respectfully to the Court, "Enough is enough." Reaffirm the mandate announced by the Chief Justice at the end of *Scheidler II*: "Because *all* of the predicate acts supporting the jury's finding of a RICO violation must be reversed, *the judgment that petitioners violated RICO must also be reversed.* Without an underlying RICO violation, *the injunction issued by the District Court must necessarily be vacated.*" 537 U.S., at 411 (emphasis added), No. 04-1352, Pet App. 48a.

CONCLUSION

The Court should reverse the court of appeals.

Respectfully submitted,

EDWARD MCGLYNN GAFFNEY, JR.
Counsel of Record
Valparaiso University School of Law
656 S. Greenwich Street
Valparaiso, IN 46383
(219) 465-7860

JOSEPH MATHIAS COSGROVE
Counsel for Martin Sheen
1460 Wyoming Ave.
Forty Fort, PA 18704
(570) 823-9078

JEFFREY S. KERR
General Counsel
People for the Ethical Treatment of Animals, Inc.
501 Font Street
Norfolk VA 23510
(757) 622-7382

APPENDIX

APPENDIX A

Particular Statements of Interest of *Amici Curiae*

Communities and Voluntary Associations

Amici are voluntary associations and individuals who engage in protest activity on a wide variety of issues. Because *Consistent Life* organized the participation of these *amici* in this brief, it is listed first.

Consistent Life (CL) is a coalition of groups and individuals committed to nonviolence and respect for life. The network promotes the consistent life ethic, focusing on the connections among issues concerning human life, including war, abortion, poverty, racism, the death penalty and euthanasia. CL supports all means of nonviolent change including, but not limited to, nonviolent direct action, political and legislative action, and direct service to those suffering under these attacks on life. *Carol Crossed* (former executive director of CL), *Mary S. Rider* (former executive director), and *Ruth Enero* (former president of the Board of Directors) have frequently engaged in nonviolent civil disobedience relating to the issues listed above. All five are married women and mothers of many children. If their political opponents were to use civil RICO against them, the loss of their homes, cars, and other valuable things they own would wreak havoc upon them and their families. Ms. Rider offered a declaration before the district court in this case at the stage when it was considering the issuance of the nationwide injunction against anyone associated with the Pro-Life Abortion Network (PLAN). This declaration challenged the enormous breadth of the nationwide injunction.

Agape is a community of faith in Franklin, Louisiana, that witnesses for peace and justice through nonviolence. It engages in education of its members and the public, especially on the death penalty, through publishing booklets, brochures, and treatises on how to effect change through raising public

awareness and consciousness about issues of justice and peace.

Carolina Interfaith Task Force on Central America (CITCA) is a voluntary association of persons who believe in nonviolent direct action on issues relating to peace and justice in Central America. CITCA notes that all citizens of the United States have the right to express their views on controversial matters in a nonviolent fashion. This right is jeopardized when federal courts penalize citizens for exercising rights that are fundamental parts of the Bill of Rights.

The Catholic-Labor Network is a place for Catholics who are active in their churches and unions to learn about their Church's teachings regarding labor issues, to pray for those who are working for economic justice, and to share information about events and struggles taking place in their area.

Catholic Peace Fellowship (CPF) is a nationwide organization of Catholics committed to peacemaking in the name of Christ. CPF engages in educational projects about peace and nonviolence, and it supports those who stand for peace by virtue of conscience. For example, some of the members of CPF have engaged in nonviolent civil disobedience of laws and policies inimical to peace in today's world.

The *Catholic Worker* (CW) is a lay Catholic community founded by Dorothy Day and Peter Maurin to bear witness to the Gospel that identifies service to the hungry, the thirsty, the homeless, and the imprisoned as a way of recognizing the presence of God in categories of human need. The community provides hospitality to homeless families while working to address the root causes of homelessness. Committed to following the teachings of Christ on nonviolence, each CW house or center engages in acts of hospitality and witness to Gospel values in a variety of ways, including demonstrations against war and militarism, poverty, and abortion. The CW

houses that join this brief are: the Casa Juan Diego (Houston, Texas); Dorothy Day Catholic Worker House (Washington, D.C.); the Day House (Detroit, Michigan); Ithaca, New York Catholic Worker; the Los Angeles Catholic Worker; Mary's House (Birmingham, Alabama); Redwood City (California) Catholic Worker; St. Francis Catholic Worker Community (Columbia, Missouri); and the St. Francis and Therese Catholic Worker House (Worcester, Massachusetts).

Center for Action and Contemplation is a Christian center forwarding the integration of social action and contemplative prayer. The members of this community regularly engage in transforming society around the issues of poverty, war, and other kinds of violence.

Citizens United for Alternatives to the Death Penalty (CUADP) is a national organization that works to end the death penalty in the United States through aggressive campaigns of public education and the promotion of tactical grassroots activism. CUADP takes no position on the abortion issue. It does not endorse or support the stand of these defendants on that issue, nor does it necessarily approve of their tactics or actions. It supports the petitioners strictly as a legal matter, urging the Justices that peaceable, nonviolent direct action—that is, peaceful civil resistance which "crosses the line" and may involve sit-ins or blocking access in a manner that might be regarded as a "threat" to property rights should not be held to constitute the federal felony punished by the Hobbs Act, without any proof of robbery or extortion. Nor should a ""pattern" of such "direct action" be penalized under the federal racketeering laws.

The Conference of Major Superiors of Men serves the leadership of Catholic orders of over 25,000 vowed religious priests and brothers in the United States. The Justice and Peace Division provides a voice for these communities throughout society in witnessing against capital punishment, war, poverty, and any issue that threatens life. The civil rights

of free speech and assembly are crucial to effective action against oppression. These civil rights are threatened by the use of the federal racketeering statute against political and religious dissenters.

The Eighth Day Center for Justice is a community composed of Catholic sisters, priests, and laity who believe that nonviolent direct action is the backbone of our democracy and the core of the Christian message. For example, some of the healing actions of Jesus on the Sabbath were viewed as a violation of the Torah. Religiously motivated opposition to unjust laws has a long and admirable history, culminating in the Civil Rights Movement and the Movement for Gender Equality in this country, and in the opposition to the assault upon human life in the Nazi regime.

Embrace a Consistent Ethic participates in ongoing peaceful public witness against all forms of taking human life, including opposition to war, capital punishment, euthanasia, abortion, racism and poverty. The members of this community believe that the *NOW vs. Scheidler* litigation interferes with the ability to carry out group/individual conscientious objection, even those actions which would normally be considered within the limits of free speech.

Every Church a Peace Church (ECPC) is an association of churches that adopt nonviolent struggle as their way to pursue justice. For this reason ECPC agrees with the brief filed in this case by the Southern Christian Leadership Conference in the court of appeals that the power to impose treble damage awards upon the petitioners and to enter a nationwide injunction under RICO represents "clear and present danger to future prospects for the lawful exercise of our liberties, namely, the free exercise of religion, speech, press, or assembly and petition for redress of grievances."

The Faith Community of St. Sabina's in Chicago is a Word-based, Bible teaching church that believes in the power

of praise and worship—a spiritual hospital where all are welcome and invited to "taste and see the goodness of the Lord." The members of the Faith Community of St. Sabina's believe that the church is called to be the immune system of the world—fighting off the attacks of Satan, by both prayer and peaceable nonviolent direct action. St. Sabina's has crusaded against a host of social evils.

Franciscan Office of Justice, Peace, and the Integrity of Creation, Santa Barbara Province, practices outreach, advocacy, and education with and on behalf of the friars and those with whom they minister.

Interfaith Worker Justice (IWJ), a national nonprofit organization founded in 1996, educates, organizes and mobilizes the U. S. religious community on issues and campaigns to improve wages, benefits and working conditions for workers, especially low-wage workers. For these reasons, IWJ is concerned about the possible misuse of the federal racketeering statute (RICO) against workers in a labor organizing context.

The Leadership Conference of Women Religious (LCWR) is an association of leaders of congregations of Catholic women religious in the United States. LCWR has approximately 1000 members, who represent about 95 percent of the 75,000 women religious in the United States. Founded in 1956, the conference assists its members to collaboratively carry out their service of leadership to further the mission of the Gospel in today's world. Social justice is an integral part of LCWR's focus. LCWR members work together to create a corporate voice that amplifies the efforts of local religious congregations. Rather than solutions that temporarily assuage injustice, LCWR members strive to think strategically about systemic change.The scope of the LCWR conference concerns is broad and includes collaborating with the Catholic church and other societal efforts that influence systemic change, studying significant trends and issues within the

church and society, utilizing our corporate voice in solidarity with people who experience any form of violence or oppression, and creating and offering resource materials on leadership skills.

Nevada Desert Experience has since 1983 organized nonviolent civil disobedience at the U.S. nuclear test site in Mercury, Nevada, where tens of thousands of people—including the actor Martin Sheen—have been arrested for trespass in their public protest against weapons of mass destruction.

The Orthodox Peace Fellowship in North America is a community of Eastern Orthodox Christians committed to witnessing for peace in our world: Eastern Orthodox Christianity has for 2000 years affirmed the Sacredness of human life from conception to death. This, we understand, is the faith of Christ, the apostles, the councils, and the fathers and mothers of the Church. This we must proclaim.

Pax Christi USA is the national Catholic peace movement of 14,000 members who are committed to the gospel imperative of seeking peace through nonviolence. The members of this association promote peace through personal and social transformation. They frequently engage in nonviolent protest of policies that undermine peace and justice.

People for the Ethical Treatment of Animals (PETA), with more than 850,000 members, is the largest animal rights organization in the world. Founded in 1980, PETA is dedicated to establishing and protecting the rights of all animals. PETA operates under the simple principle that animals are not ours to eat, wear, experiment on, or use for entertainment. PETA focuses its attention on the four areas in which the largest numbers of animals suffer the most intensely for the longest periods of time: on factory farms, in laboratories, in the clothing trade, and in the entertainment industry. We also work on a variety of other issues, including the cruel killing of beavers, birds and other "pests," and the

abuse of backyard dogs. PETA works through public education, cruelty investigations, research, animal rescue, legislation, special events, celebrity involvement, and protest campaigns.

The Peter Maurin Center in Washington, D.C., was established in 1997. In the words of Peter Maurin, the center seeks to contribute to creating a "society where it is easier to be good." The Center does so in three ways: (1) evangelization in the Catholic Worker tradition through operating the Catholic Worker Bookstore; (2) carrying out the works of mercy through operating a furniture and household goods exchange, whereby people who have more than they need give it to the Center, which distributes it to needy people; and (3) organizing for peace and justice through solidarity with the people of Puerto Rico in their effort to de-colonize, and specifically to rid themselves of the Navy at Vieques; and (4) through work for the abolition of the death penalty, specifically focusing on the case of Mumia Abu-Jamal. The Center is concerned with the broad and elastic application of the RICO act to dissent and nonviolent protest. The misapplication of the law in this way permits the government to single out and criminalize movements for social change virtually at will. Affording the government power of this nature renders democratic practices timid and superficial and essentially disempowers the People in the political process. To protect popular, and especially unpopular, political expression, these effects of the RICO law need to be nullified.

Plowshares is a coalition of religious believers who seek to enflesh the words of the prophet Isaiah 2:4, "They shall beat their swords into plowshares, and their spears into pruning hooks. Nation shall not take up sword against nation and neither shall they study war anymore." The founders of this movement, Fr. Daniel Berrigan, S.J., and his deceased brother Philip Berrigan were leaders in the opposition to the Vietnam War. From burning draft files to organizing larger civil

disobedience actions, they provided the peace movement with a sharp focus. Fr. Berrigan offered a declaration before the district court in this case at the stage when the court was considering the issuance of the nationwide injunction against anyone associated with the Pro-Life Abortion Network (PLAN). This declaration addresses the severe impact on nonviolent social protest that flows from treating loose associations of antiwar protesters as though they were racketeer-influenced corrupt organizations. Fr. Berrigan joins this brief in his individual capacity, as do the following Plowshares Activists: Bruce Friedrich, Art Laffin, Paul Magno, Patrick O'Neill, and Kathy Boylan Shields. All of these activists have spent many years imprisoned for their nonviolent protest against war.

Sojourners is a Christian ministry whose mission is to proclaim and practice the biblical call to integrate spiritual renewal and social justice. In response to this call, the members of this community offer a vision for faith in public life by: publishing Sojourners magazine, and other resources that address issues of faith, politics, and culture from a biblical perspective; preaching, teaching, organizing, and public witness; nurturing community by people from the various traditions and streams of the church; hosting an annual program of voluntary service for education, ministry, and discipleship. Members of Sojourners seek to be guided in their lives and work by the biblical principles of justice, mercy, and humility.

Witnesses for Reconciliation (WFR) was formerly the Committee of Southern Churchmen that was founded in the 1960's to promote the work and vision of Dr. Martin Luther King, Jr., and to advance his cause of nonviolence. The Committee promoted, participated in, and led marches, sit-ins, boycotts, and the freedom rides. WFR continues to advance the cause of civil and political rights for minorities.

Individuals

David Atwood is the director of the Texas Coalition to Abolish the Death Penalty. This group regularly organizes demonstrations against the death penalty in Texas.

Donald Bauer is a Catholic priest who served as a member of the New York State Labor and Religion Coalition since its inception, and who worked tirelessly for farmworker wage equity and other issues on behalf of the poor. He also was appointed to the Congress on Racial Equality and in both of these capacities used public witness to educate and challenge the public.

Michael Baxter, C.S.C. is a theology professor at the University of Notre Dame, and the national president of the Catholic Peace Fellowship.

Wendell Berry is an American poet, novelist, essayist, philosopher and farmer. He has published several collection of poems, and essays about his commitment to the preservation of ecological diversity and integrity, and the renewal, on sound cultural and ecological principles, of local economies and local communities.

Abe Bonowitz is the director of Citizens United for Alternatives to the Death Penalty (CUADP), a national organization that works to end the death penalty in the United States through aggressive campaigns of public education and the promotion of tactical grassroots activism. On occasion he has engaged in peaceful acts of civil resistance. While CUADP takes no position on the abortion issue, Bonowitz is pro-choice and, therefore, he is in profound disagreement with the petitioners on that issue and deplores the violent tactics that abortion opponents have been known to employ. He does not know these petitioners and has no personal knowledge of their tactics. He is informed, though, that jurors at the trial of this case found petitioners or unidentified persons "associated with" them responsible for four acts or

threats against persons or property. He supports this appeal only because, as a legal matter, political protest involving sit-ins or blocking access should not be condemned as "extortion" or "racketeering."

Roy Bourgeois, M.M., is a Maryknoll priest who, after years as a foreign missionary in Central America, founded the School of the Americas Watch (SOAW), a loose coalition of citizens concerned about the widespread abuse of human rights—including torture and murder of religious leaders and labor leaders throughout Central and South America—by foreign military officers who study at the U.S. Army School of the Americas at Ft. Benning, Georgia. *Eric LeCompte* is the director of programming of SOAW. Each November—on the anniversary of the assassination of six Jesuit priests and their domestic workers in San Salvador by graduates of the School of the Americas—SOAW organizes a major demonstration against the negative effects of this program upon peace and justice in our hemisphere.

Bernard Broussard is the founder of the Human Relations Council of Louisiana, a group that played a leading role in community organization on behalf of the civil rights of African Americans in Louisiana in the mid 1960s. From that time to the present, he continues to challenge through marches, demonstrations, holding prayer meetings on behalf of the oppressed in the South. He is a founder of Starthrowers, a human rights organization based in Louisiana.

Will Davis Campbell is a writer, lecturer, and long time supporter of the Civil Rights Movement who helped escort African-American children when they tried to integrate a Little Rock, Arkansas high school back in 1957. A founding member of Dr. King's Southern Christian Leadership Conference, he became the Executive Director of the Committee for Southern Churchmen, which is now known as Witnesses for Reconciliation.

Thomas Cornell is the founder of the Catholic Peace Fellowship and an ordained deacon in the Catholic Church. He is the editor of *The Catholic Worker*, a newspaper of national circulation founded by Dorothy Day, and he lives at the Catholic Worker farm in Marlboro, New York.

John Dear, S.J., has written over 100 articles on peace and nonviolent action Fr. Dear's writings focus on nonviolence and peacemaking. One of his books, *Peacemaking Behind Bars*, is an account of his time spent in jail for a 1993 action at Seymour Johnson Air Force Base in Goldsboro, N.C. He has participated in many other actions of nonviolent civil disobedience for justice and peace.

Stephen Dear is the executive director of People of Faith Against the Death Penalty, a national organization with headquarters in Carrboro, North Carolina.

Heather DeMaim is a founding member of Not Dead Yet and ADAPT, a disability rights organizations in Missouri.

Jim and Shelley Douglass are co-founders of Mary House, Catholic Workers, in Birmingham, Alabama, peace activists, co-founders of Ground Zero Center for Nonviolent Action, and co-organizers of a national campaign to stop the "White Trains" transporting nuclear weapons across the U.S. and to stop the Trident nuclear submarine and missile system. The Douglasses believe that every nonviolent movement in U.S. history could have been squelched by the way in which RICO has been applied in *NOW v. Scheidler*.

Thomas Gumbleton is a Catholic bishop in the Archdiocese of Detroit, Michigan, and a founder of Pax Christi, USA. He was a leading voice urging the United States Conference of Catholic Bishops to issue its statement in 1971 collectively opposing the Vietnam War on the ground that the war could no longer be justified under the principles of the just war tradition. Bishop Gumbleton has worked and visited in poor and war-torn countries in Latin America and the Caribbean

and is deeply concerned with human rights violations around the world. He holds a deep belief in the power of nonviolence to effect social change.

Lana Jacobs has been arrested numerous times at the Strategic Air Command base in Omaha, Nebraska, and Whiteman AFB protesting the stealth bomber; has trial in September 2005 for opposing ROTC in the schools in Missouri; In March, 2005, Lana was arrested for taking water to Terri Schiavo. She is the recipient of the Martin Luther King Jr. Award and the Shalom Peace Award.

Kathy Kelly is a co-founder of Voices in the Wilderness, a group that has sought to end the economic sanctions against the people of Iraq, by sending delegations to Iraq to break the siege and to bring desperately needed medical supplies to children and families, and by sponsoring demonstrations against these sanctions, including week-long fasting outside the headquarters of the United Nations in New York. Voices in the Wilderness has also protested against the current war in Iraq. The American Friends Service Committee nominated Ms. Kelly for the Nobel Peace Prize.

Andy Lipscomb is a member of Witnesses for Reconciliation, a board member of Consistent Life, and a long-time activist for civil rights.

Deborah McEvoy is a member of Feminists for Life of America and of the Detroit Peace Community. In her role as a health professional, she supports the needs of women and their children through petitions, public advocacy and demonstrations.

Rachel MacNair, a Quaker, is the founder and director of the Feminism and Nonviolence Studies Association. She has written a seminal book on peace psychology, and has been arrested frequently for participation in nonviolent direct actions at nuclear weapons facilities and abortion clinics.

John W. Oliver is the coordinator of the Orthodox Peace Fellowship in North America. He is professor emeritus of history at Malone College.

Gail Phares is a founder of Witness for Peace (WFP) a national organization working to affect U.S. policy in Latin America. Ms. Phares is also the founder and director of the Carolina Interfaith Task Force on Central America. She has led many delegations to war-torn areas in Latin America and frequently joins nonviolent peace and justice actions at home. The members of WFP believe that organizing for justice—including the right to nonviolent protest of official policies of our government—is a fundamental right secured under the Constitution.

Rev. Michael Pfleger is Pastor of the Faith Community of St. Sabina's on Chicago's South Side, a "Pastor, Preacher, Parent, Lecturer, Activist, and 'Errand Boy for Jesus,' " who has mobilized his parish and community in a series of protest crusades, sometimes involving peaceable nonviolent direct action, including campaigns against drug paraphernalia (which precipitated statewide legislation), "Standing Up—Talking Back," a social action crusade, an anti-Alcohol & Tobacco Billboard campaign which reduced the number of such billboards from 118 to 40 in the local community, and sting operations to identify vendors selling liquor to minors. On April 27, 1998, citing the verdict in *NOW vs. Scheidler*, the Chicago Sun-Times editorialized that, if RICO weren't curtailed, that statute might even be invoked to deter or punish Fr. Pfleger's and St. Sabina's community-based protest against the trivialization of violence on the Jerry Springer TV show.

Sister Helen Prejean, CSJ, is internationally known for her opposition to the death penalty and her work with both death row inmates and the families of murder victims. She is the founder of Survive, a New Orleans victim's advocacy group, and the author of *Dead Man Walking: An Eyewitness Account*

of the Death Penalty in the United States, which became both a national and international bestseller and a major motion picture. Sister Helen does not believe that peaceful, nonviolent protesters should be condemned as "extortionists" or protest leaders prosecuted as "racketeers."

Scott and *Claire Schaeffer-Duffy* are co-founders of the Saints Francis and Therese Catholic Worker in Worcester, MA, a lay Catholic pacifist community which offers hospitality to homeless men and women. They also publish *The Catholic Radical*, a bi-monthly journal of opinion. Scott has engaged in civil disobedience at weapons facilities and abortion clinics, and has lectured extensively at colleges and universities throughout New England on the value of nonviolent direct action. The Schaeffer-Duffys state their interest in this case as follows: "Nonviolent civil disobedience is an American tradition, one that has brought much good to our country. We advocate its use when laws contradict the needs of the common good and the greater law of God's love for all."

Martin Sheen is an actor who has participated for nearly two decades in protests against weapons of mass destruction and in demonstrations pertaining to homelessness and other issues of social justice.

John Stoner is a member of Mennonite Central Committee, a traditional peace church. He is the founder of Every Church a Peace Church, a movement to share the convictions of the Anabaptist community with all other Christian churches.

Brian Terrell is a leader of the Catholic Peace Ministry in Des Moines, Iowa and is a participant with members of the Des Moines Catholic Worker community in nonviolent Gandhian activism at Offutt Air Force Base.

Howard Zinn is a professor of history at Boston University. He has served as a professor of history at Spelman College in Atlanta, and as a visiting professor at the University of Paris

and the University of Bologna. He has written over a dozen books which deal in some way with protest movements in American history. Two of these books most closely related to the theme of this brief are *Disobedience and Democracy* (1968), and *A People's History of the United States* (3d ed. 1999).

Stephen Zunes is Professor of Politics at the University of San Francisco. He is the principal editor of *Nonviolent Social Movements* (Blackwell, 1999). His research interests have included the impact of grassroots political movements on policy and government. Prior to his academic career, he engaged in nonviolent civil disobedience campaigns against nuclear power, nuclear weapons and apartheid and served as a staff member and nonviolence trainer for organizations supporting nonviolent civil disobedience.

Nos. 04-1244 & 04-1352

Supreme Court, U.S.
FILED
OCT 21 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, et al.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE FEMINIST MAJORITY FOUNDATION, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., MEDICAL STUDENTS FOR CHOICE, NATIONAL ABORTION FEDERATION, NATIONAL COALITION OF ABORTION PROVIDERS, AND PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

STEVEN G. GEY*
Florida State University College of Law
425 West Jefferson
Tallahassee, FL 32306
(850) 644-5467

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Interests of Amici Curiae	1
Summary of Argument	3
Argument	4
I. The Nationwide Campaign of Terror by Petitioners Against Abortion Providers, Staff, and Clinics Limits Women's Already Restricted Access to Reproductive Health Care	4
A. Reproductive Health Care Providers Are the Targets of Domestic Terrorism	5
B. Unchecked Violence Further Restricts Women's Already Limited Access to Reproductive Health Care	9
II. The Nationwide Injunction Is Necessary to Protect Clinics From Violence	13
A. PLAN and Operation Rescue Used Violence to Shut Women's Health Care Clinics	13
B. Injunctions Are a Well Established, Effective Method to Ensure Access to Clinics	14
C. The Petitioners' Nationwide Campaign Requires a Nationwide Response	16
III. Petitioners Violated the Hobbs Act When They Committed and Threatened Physical Violence In Order to Obstruct and Delay Commerce In Reproductive Health Services	17
A. This Court Has Not Yet Addressed Whether Threats and Violence Constitute an Independent Basis for Hobbs Act Liability	18

TABLE OF CONTENTS – Continued

Page

B. The Text of the Hobbs Act Requires Treating the "Commits or Threatens Physical Violence" Offense as Distinct from the "Robbery or Extortion" Offense 20

C. The Legislative History of the Hobbs Act Supports Treating Threats and Violence as a Separate Offense from Extortion and Robbery 24

Conclusion 30

TABLE OF AUTHORITIES

Page

CASES

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 21

Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995) 21

Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002) 24

Caminetti v. United States, 242 U.S. 470 (1917) 20

Fargo v. Lambs of Chris., 488 N.W.2d 401 (N.D. 1992) 15

Gonzales v. Raich, 125 S.Ct. 2195 (2005) 29

Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) 1, 12, 14

Ne. Women's Ctr., Inc. v. McMonagle, 939 F.2d 57 (3d Cir. 1991), *cert. denied*, 493 U.S. 901 (1989) 15

NOW v. Scheidler, 510 U.S. 249 (1994) 18, 19

NOW v. Scheidler, 91 Fed. Appx. 510 (7th Cir. Feb. 26, 2004) 19

NOW v. Scheidler, 267 F.3d 687 (7th Cir. 2001) 14

NOW v. Scheidler, No. 86-C788, 1999 U.S. Dist. LEXIS 11980 (N.D. Ill. July 28, 1999) 13, 14, 17

Operation Rescue v. Planned Parenthood, 975 S.W.2d 546 (Tex. 1998) 12, 15

Planned Parenthood of Mass. v. Blake, 631 N.E.2d 985 (Mass.), *cert. denied*, 513 U.S. 868 (1994) 15

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) 11

TABLE OF AUTHORITIES – Continued

Page

Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. for Life Activists, 41 F. Supp. 2d 1130 (1999), *aff'd in part*, 290 F.3d 1058 (9th Cir. 2002) 6

Potter v. United States, 155 U.S. 438 (1894) 21

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 23

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 24

Scheidler v. NOW, 537 U.S. 393 (2003) 19, 20, 25, 29

Stirone v. United States, 361 U.S. 212 (1960) 26

United States v. Enmons, 410 U.S. 396 (1973) 25

United States v. McMillan, 946 F. Supp. 1254 (S.D. Miss. 1995) 6, 7

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 20, 23

United States v. Teamsters, 315 U.S. 521 (1942) 25

Watts v. United States, 394 U.S. 705 (1969) 29

STATUTES

15 U.S.C. § 1692d(1) 28

18 U.S.C. § 248 9

18 U.S.C. § 601 28

18 U.S.C. § 844(e) 28

18 U.S.C. § 871 27

18 U.S.C. § 873 27

18 U.S.C. § 875 27

18 U.S.C. § 876 28

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 877 28

18 U.S.C. § 878 28

18 U.S.C. § 879 28

18 U.S.C. § 1030 28

18 U.S.C. § 1951(a) 19, 21, 22, 25, 26

18 U.S.C. §§ 1961-68 ..... 13, 18

19 U.S.C. § 1341 28

21 U.S.C. §§ 801-971 28

42 U.S.C. § 300i-1(b) 28

Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979, § 2(a)-(c) 25

Hobbs Anti-Racketeering Act of 1946, ch. 537, 60 Stat. 420, §§ 2-5 25

OTHER AUTHORITIES

2000 Feminist Majority Foundation National Clinic Violence Survey Report, 2001 *at* http://www.feminist.org/research/cvsurveys/clinic_survey2000.pdf 8, 10

2002 Feminist Majority Foundation Clinic Violence Survey Report, 2002 *at* http://www.feminist.org/research/cvsurveys/clinic_survey2002.pdf 9, 10, 12

91 Cong. Rec. 11902 (1945) 26

Alan Guttmacher Institute, *Facts in Brief, Induced Abortion*, May, 2005, *at* http://www.agi-usa.org/pubs/fb_induced_abortion.html 10

TABLE OF AUTHORITIES – Continued

Page

Cindy West, *Shooting: Protest, Random Violence?*, Pensacola News J., Aug. 23, 1993 5

City of Atlanta v. Operation Rescue, Plaintiffs' Ex. 926, *City of Atlanta v. Operation Rescue*, No. D-61462 (Superior Court of Fulton County, Mar. 28, 1990) 15

Donald Plummer & Cameron McWhirter, *Rudolph Cuts Deal: Olympic Bombing Suspect to Plead Guilty*, Atlanta J.-Const., Apr. 9, 2005 7

Donald Plummer, *Olympic Blast Still Haunts Officials*, Atlanta J.-Const., Feb. 23, 2002 7

Editorial, *Elusive Fugitives*, USA Today, June 2, 2003 8

Freedom of Access to Clinic Entrances Act of 1993, S. Rep. No. 103-117 (1993) 10, 16, 17

Hill Sentenced to Death in Clinic Killings, Baltimore Sun, Dec. 7, 1994 6

Jack Warner, *Rudolph Indicted in Four Bombings*, Atlanta J.-Const., Nov. 16, 2000 ..... 7, 8

James Risen & Judy L. Thomas, *Wrath of Angels: The American Abortion War* (1998) 5, 7

Joint Appendix, Testimony of Dr. Susan Wicklund 11

Judy Lundstrom Thomas, *Manual Instructs Anti-Abortionists on Bomb-Making*, Times-Picayune (New Orleans), Oct. 2, 1994 6

Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 Persp. on Sexual and Reprod. Health (Jan.-Feb. 2003) 10

TABLE OF AUTHORITIES – Continued

Page

Michael Bates, *Woman Arrested in the Wounding of Abortion Doctor*, Associated Press, Aug. 20, 1993 5

Michael Beebe, *Kopp Gets Maximum Term, Amherst Doctor's Killer to Serve 25 Years to Life*, Buffalo News, May 9, 2003 7

NAF, *History of Violence—Arsons and Bombings*, *at* http://www.prochoice.org/about_abortion/violence/arsons.asp 8

NAF, *Violence and Disruption Statistics*, *at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_statistics.pdf 8

NARAL Pro-Choice America, *Who Decides?*, *at* http://www.prochoiceamerica.org/yourstate/whodecides/trends/issues_low_income.cfm 11

Operation Rescue Br. 27

Plaintiffs' Ex. 4A; Trial Tr. 16

Plaintiffs' Ex. 519 12

Plaintiffs' Ex. 608 7

Plaintiffs' Ex. 647 16

Plaintiffs' Ex. 650 16

Plaintiffs' Ex. 721 16

Scheidler Br. 27

Stanley Henshaw, *Factors Hindering Access to Abortion Services*, 27 Fam. Plan. Persp. 54 (Mar./Apr. 1995) 12

Test. of Joseph Scheidler, Trial Tr. 6

Test. of Ms. A, Trial Tr. 11

TABLE OF AUTHORITIES – Continued

Page

Test. of Susan Hill, Trial Tr. 14

United States General Accounting Office, *Abortion Clinics, Information on the Effectiveness of the Freedom of Access to Clinic Entrances Act*, GAO Report No. GGD-99-2, 13-14 (Nov. 1998) 15

INTERESTS OF AMICI CURIAE

Amici Curiae[1] are organizations dedicated to the protection and expansion of women's reproductive health care. Through the provision of reproductive health care services, education, direct clinic assistance, security training, organizing, advocacy, litigation, training of physicians, and legislation, these groups have helped reduce the level of violence faced by health care providers and the women who are their patients and increase women's access to quality reproductive health care.

Feminist Majority Foundation (FMF), a nonprofit organization, runs the largest clinic defense project in the nation and has been active in defending clinics throughout the country from violence. FMF provides security assessments and training for clinic staffs, operates a clinic violence hotline and emergency alert warning system, tracks incidences of violence against women's health care clinics, and conducts a periodic social science survey of the extent of violence committed against abortion providers. The President of FMF, Eleanor Smeal, was the President of the National Organization for Women (NOW) when NOW began this litigation. FMF actively pursues legal protection for reproductive health services and provided legal counsel for Respondent Women's Health Center in *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).

Planned Parenthood Federation of America, Inc. (PPFA), a New York nonprofit corporation, is the world's

---

[1] Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief, in whole or in part, and that no person, other than amici, their members, or their counsel, made a monetary contribution to the preparation and submission of the brief. All parties have consented to the filing of this brief.

oldest and largest voluntary reproductive health care organization. PPFA provides leadership to 121 autonomous affiliates that manage approximately 800 medical centers in all 50 states and the District of Columbia, providing a wide range of reproductive health education and medical services to nearly five million women and men a year. PPFA's affiliates, staff, and patients have been the targets of hundreds of illegal violent attacks by anti-abortion extremists—attacks ranging from murder and arson, to illegal invasions, butyric acid attacks, fake anthrax attacks, etc. PPFA and its affiliates are committed to taking every possible step within the bounds of the law to protect the safety of their patients, staff, and facilities and thus are profoundly concerned that the national injunction remains intact.

Medical Students for Choice (MSFC) is an advocacy organization with nearly 7,000 medical student members in medical schools across the United States and Canada. Its mission is to ensure that women receive the full range of reproductive health care by working to make reproductive health care a part of standard medical education and residency training. One of the greatest barriers to safe and legal abortion today is the absence of trained providers. Medical Students for Choice members, as many physicians have before them, face realistic fears for their personal safety because of deliberate targeting by the petitioners.

National Abortion Federation (NAF), a nonprofit organization founded in 1977, is the professional association of abortion providers in North America. Its members include over 400 nonprofit and private clinics, women's health centers, hospitals, and private physicians' offices in 47 states. NAF's members care for over half of women who choose abortion in the United States each year. NAF acts as an

advocate for provider protection with all levels of law enforcement; issues timely information alerts and updates about anti-choice violence; maintains statistics on anti-choice violence and a data bank on militant anti-choice groups and individuals; and conducts on-site security assessments and training for clinic staff to assist with safety concerns.

Physicians for Reproductive Choice and Health (PRCH) is the voice of pro-choice physicians. A national nonprofit, the mission of PRCH is to enable concerned physicians to take a more active and visible role in support of universal reproductive health. PRCH is committed to ensuring that all people have the knowledge, access to quality services, and freedom of choice to make their own reproductive health decisions. PRCH works to support abortion providers and other pro-choice physicians who are faced with violence and harassment because of their support of access to comprehensive reproductive health care.

The National Coalition of Abortion Providers (NCAP) is a nonprofit organization dedicated to helping the nearly 150 independent abortion provider member clinics better meet the needs of their communities. NCAP members have been innovative leaders in providing quality medical care. Abortion is one of the safest procedures performed today because of their skills, commitment, and understanding.

SUMMARY OF ARGUMENT

In the mid-1980's, Joseph Scheidler and his associates (petitioners) began a campaign to terrorize abortion providers, women's health care clinic staff, and patients. After a full trial, a jury found that petitioners had engaged in four "acts or threats of physical violence to any person

or property." The District Court then issued a nationwide injunction to halt these illegal actions. The Hobbs Act prohibits anyone from "commit[ting] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose" of obstructing commerce. In this case, petitioners' ongoing campaign of threats and violence are preventing patients from accessing legal and necessary health services. Nothing in the statute's history justifies their assertion that the Hobbs Act prohibition of threats and acts of violence should not be read as it is written. The District Court's injunction against further violations of the Hobbs Act should therefore be upheld.

ARGUMENT

I. THE NATIONWIDE CAMPAIGN OF TERROR BY PETITIONERS AGAINST ABORTION PROVIDERS, STAFF, AND CLINICS LIMITS WOMEN'S ALREADY RESTRICTED ACCESS TO REPRODUCTIVE HEALTH CARE

At the time PLAN and Operation Rescue carried out the acts of violence and threats against clinics in this case, a pervasive national climate of violence against reproductive health care providers existed. Petitioners helped create and perpetuate this climate of violence—with the goal of closing down women's health care providers nationwide. The nationwide injunction established in this case has protected clinics for years from petitioners' violent acts and intimidation. If it is lifted, those clinics will be left vulnerable, and petitioners will be emboldened to renew their illegal activities. Violence against women's health care facilities harms women by reducing the number of women's health care clinics and staff.

A. REPRODUCTIVE HEALTH CARE PROVIDERS ARE THE TARGETS OF DOMESTIC TERRORISM

Clinics have suffered massive physical damage from anti-abortion extremist violence during the past thirty years, including blockades, invasions, bombings, arson, chemical attacks, gunfire, bomb threats, death threats, and arson threats.

In 1993 the violence turned deadly. Since then, eight abortion providers or staff have been murdered by anti-abortion extremists; twenty have been wounded, some critically. In Pensacola, Florida, in 1993 after the publication of a Wild West-style "UN-WANTED" poster, Dr. David Gunn was shot and killed at the rear entrance of Dr. Wayne Patterson's clinic while Rescue America staged a protest at the front of the clinic; Michael Griffin was sentenced to life in prison. Rescue America was founded by Donald Treshman, who was a regional director of PLAN. Michael Bates, *Woman Arrested in the Wounding of Abortion Doctor*, Associated Press, Aug. 20, 1993; Test. of Joseph Scheidler, Trial Tr., at 3990. The same year, in August in Mobile, Alabama, Dr. Wayne Patterson himself was shot and killed, again after the publication of an "UN-WANTED" poster. Cindy West, *Shooting: Protest, Random Violence?*, Pensacola News J., Aug. 23, 1993, at A1.

In Wichita, Kansas, in 1993, Dr. George Tiller was shot at point blank range in his car by Rachelle "Shelly" Shannon. Bates, *supra*. Shannon was active in Operation Rescue as early as 1988 when she was arrested as part of petitioner's campaign to blockade clinics in Atlanta. James Risen & Judy L. Thomas, *Wrath of Angels: The American Abortion War*, 275 (1998). The Army of God manual, a how-to primer on violence against reproductive health care clinics including

bomb-making instruction, was discovered buried in Shannon's yard during a police search. Judy Lundstrom Thomas, *Manual Instructs Anti-Abortionists on Bomb-Making*, Times-Picayune (New Orleans), Oct. 2, 1994, at A15.

In 1994, Dr. John Bayard Britton and volunteer escort Lt. Col. James Barrett were shot and killed in the clinic driveway. Paul Hill was sentenced to death and ultimately executed for this crime. June Barrett, Lt. Col. Barrett's wife, was also shot and wounded in the attack. *Hill Sentenced to Death in Clinic Killings*, Baltimore Sun, Dec. 7, 1994, at A1.

Following the murders of Drs. Gunn and Britton and Lt. Col. Barrett, anti-abortion extremists circulated and signed "justifiable homicide" petitions. One petition stated in part:

> We, the undersigned, declare the justice of taking all godly action necessary, including the use of force to defend innocent human life (born and unborn). We proclaim that whatever force is legitimate to defend the life of a born child is legitimate to defend the life of an unborn child.
>
> We declare and affirm that if in fact Paul Hill did kill or wound abortionist John Britton and accomplices James Barrett and Mrs. Barrett, his actions are morally justified if they were necessary for the purpose of defending innocent human life.

United States v. McMillan, 946 F. Supp. 1254, 1263-64 (S.D. Miss. 1995) (quoting from the justifiable homicide petition). Signers of this justifiable homicide petition included leaders of organizations involved in PLAN, including Andrew Burnett (a Regional Director of PLAN). Test. of Joseph Scheidler, Trial Tr., at 3990; *Planned*

Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 41 F. Supp. 2d 1130, 1140 (1999), *aff'd in part*, 290 F.3d 1058 (9th Cir. 2002) (noting that Burnett signed petition) and Roy McMillan, an organizer of a PLAN conference. Pls' Ex. 608; *McMillan*, 946 F. Supp. at 1263 (noting that McMillan signed petition).

In 1997, in Atlanta, seven people were injured in two bombings at the Northside Family Planning Clinic. Donald Plummer, *Olympic Blast Still Haunts Officials*, Atlanta J.-Const., Feb. 23, 2002, at 9A. The second bomb, targeting law enforcement and emergency rescue personnel, was detonated an hour after the first. *Id.* The Army of God claimed credit for these attacks. Jack Warner, *Rudolph Indicted in Four Bombings*, Atlanta J.-Const., Nov. 16, 2000, at 7C. After five years as a fugitive, Eric Robert Rudolph was captured, charged, and pled guilty to the bombings. Donald Plummer & Cameron McWhirter, *Rudolph Cuts Deal: Olympic Bombing Suspect to Plead Guilty*, Atlanta J.-Const., Apr. 9, 2005, at 1A.

In 1998, Dr. Barnett Slepian was shot and killed in his home by a sniper as he stood in front of his kitchen window. James Charles Kopp was indicted for this murder, and after two and one-half years as a fugitive, was captured and convicted of murder. Michael Beebe, *Kopp Gets Maximum Term, Amherst Doctor's Killer to Serve 25 Years to Life*, Buffalo News, May 9, 2003, at A1. Like Rachelle Shannon who was convicted of attempting to murder Dr. Tiller, Kopp was active in Operation Rescue as early as 1988 when he too was arrested as part of Petitioner Operation Rescue's campaign to blockade and shut-down clinics in Atlanta during the Democratic National Convention. Risen & Thomas, *supra*, at 275.

In 1998, off-duty police officer Robert Sanderson was killed in a bomb explosion at the Birmingham, Alabama, New Woman, All Women Clinic where he worked as a security guard; clinic nurse Emily Lyons was maimed in the attack. Warner, *supra*. The Army of God claimed credit for the bombing, and Eric Robert Rudolph was charged and convicted. Editorial, *Elusive Fugitives*, USA Today, June 2, 2003, at 10A.

From 1977 until 1999 (the year the injunction in this case was issued), as reported to the National Abortion Federation (NAF), 161 women's health care facilities were the target of arson; 40 were bombed; and 77 clinics were the targets of attempted bombings or arsons. *NAF Violence and Disruption Statistics*, *at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/violence_statistics.pdf (last visited Oct. 18, 2005).[2] Together, the arsons and bombings have caused close to fifteen million dollars in property damage. NAF, *History of Violence—Arsons and Bombings*, *at* http://www.prochoice.org/about_abortion/violence/arsons.asp (last visited Oct. 18, 2005).

A periodic national social science survey of abortion providers found that in 1993 fifty percent of clinics surveyed had experienced severe violence. *2000 Feminist Majority Foundation National Clinic Violence Survey Report*, 2001, 5 at http://www.feminist.org/research/cvsurveys/clinic_survey2000.pdf (2000 FMF Survey).[3] National efforts

---

[2] These incidences include only those reported directly to the National Abortion Federation. The actual numbers are even higher.

[3] "Severe Violence" is defined as "blockades, invasions, bombings, arsons, chemical attacks, stalking, physical violence, gunfire, bomb threats, death threats, and arson threats." *2000 FMF Survey*, *supra*, at 5. The Feminist Majority Foundation's clinic violence survey sends

(Continued on following page)

by women's rights supporters, including this lawsuit and the passage of the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, have decreased some of the violence faced by clinics. In 2002, twenty-three percent of clinics surveyed reported being the target of extreme violence. *2002 Feminist Majority Foundation Clinic Violence Survey Report*, 2002 *at* http://www.feminist.org/research/cvsurveys/clinic_survey2002.pdf at 3 (2002 FMF Survey).

For years, the injunction established in this case has protected clinics across the country from petitioners' violent acts and intimidation. If the injunction is lifted, petitioners will be emboldened to renew their illegal activities and domestic terrorism against women's health clinics may once again dramatically increase.

B. UNCHECKED VIOLENCE FURTHER RESTRICTS WOMEN'S ALREADY LIMITED ACCESS TO REPRODUCTIVE HEALTH CARE

The failure to protect women's health care providers harms not only the providers and clinic staff, but ultimately all women who seek reproductive health care services. According to a Senate Report on FACE:

> Some providers have succumbed to the intimidation and threats. At least three physicians in Dallas stopped performing abortions in 1992 as a

---

questionnaires to all facilities it can identify as providing abortion services in the United States. In 2000, surveys were sent to 798 providers; 361 responded for a response rate of 45%. In 2002, surveys were sent to 739 providers; 338 responded for an overall response rate of 46%. Analysis on the received data is conducted using SPSS (Statistical Package for the Social Sciences).

> result of pressure by anti-abortion groups. In early 1993, after receiving death threats, two doctors stopped working at an abortion clinic in Melbourne, FL. And since Dr. Gunn was shot in March 1993, at least eight more doctors have stopped offering abortion services.

Freedom of Access to Clinic Entrances Act of 1993, S. Rep. No. 103-117, at 17 (1993).

In 1993, after the murder of Dr. Gunn, twenty-three percent of clinics surveyed had staff or physicians resign because of violence or harassment. *2000 FMF Survey*, *supra*, at 13. In 1999, after the murder of Dr. Barnett Slepian, ten percent of clinics surveyed reported that a physician or other staff had quit their jobs as a result of anti-abortion violence, harassment, or intimidation. *Id.* In 2002, staff members were much more likely to resign at clinics experiencing high levels of violence. *2002 FMF Survey*, *supra*, at 14.

Violence against women's health care clinics and providers makes access to abortion for many a right in theory only. Between 1992 and 1996, the number of abortion providers decreased by fourteen percent. *Id.* Between 1996 and 2000, the number of abortion providers continued to decline in thirty-eight states and the District of Columbia. Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 Persp. on Sexual & Reprod. Health, at Table 3 (Jan.-Feb. 2003). Consequently, as of 2000, only thirteen percent of counties in the United States had abortion providers. Alan Guttmacher Institute, *Facts in Brief, Induced Abortion*, May 2005, *at* http://www.agi-usa.org/pubs/fb_induced_abortion.html (last visited Oct. 18, 2005).

The shrinking numbers of abortion providers place an extreme burden on women. In addition to the cost of an abortion (which, in most states is not covered by public funding or insurance[4]), women are forced to travel further at greater costs to and from the clinic and take time off from work. Additionally, the smaller number of providers means that some doctors have to travel from state to state in order to make sure that women's access to abortion is maintained. At trial, Dr. Susan Wicklund testified that she would fly from Wisconsin to Fargo, North Dakota. Dr. Wicklund's trips to Fargo were necessary because "they were having a real hard time finding physicians to keep [the clinic] open." Joint Appendix at 115, Test. of Dr. Susan Wicklund.

When a clinic is closed because of anti-abortion violence, some women lose their only chance to have an abortion. In these cases, anti-abortion extremists successfully deny a woman her Constitutional rights and force her to accept the extremists' decision of what her future should be. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part and dissenting in part) (noting that restrictions on abortion deprive a woman of "basic control over her life").

For other women, a closed clinic means waiting longer for an abortion. At trial, Ms. A, a woman carrying a fetus with a condition incompatible with life, testified how she traveled to Wichita, Kansas. PLAN's forcible blockade of the clinic there made her postpone her visit for three days. Test.

---

[4] In 33 states and the District of Columbia, public funding for abortion is restricted. *See Who Decides?* NARAL Pro-Choice America Foundation website, *at* http://www.prochoiceamerica.org/yourstate/whodecides/trends/issues_low_income.cfm (last visited Oct. 18, 2005).

of Ms. A, Trial Tr., at 768, 774. For some, the delay increases the possibility of complications and decreases the chances that a provider will be available for the abortion. *See, e.g.*, Stanley Henshaw, *Factors Hindering Access to Abortion Services*, 27 Fam. Plan. Persp. 54, 56 (Mar./Apr. 1995). In those situations where the clinic remains open but the patient has to survive a gauntlet of abuse and harassment, several courts have noted the adverse medical effects on patients. *See, e.g., Madsen v. Women's Health Ctr.*, 512 U.S. 753, 758 (1994) (according to the clinic doctor, patients "manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures"); *Operation Rescue v. Planned Parenthood*, 975 S.W.2d 546, 551 (Tex. 1998) ("Physicians reported increased respiration, heart rate, and blood pressure.").

When anti-abortion violence closes down a clinic, it also has the effect of shutting down the only source of any type of reproductive health care for many women. Clinics that provide abortions also provide a wide range of health related services for women. 2002 FMF Survey, *supra*, at 5 (96% of clinics surveyed provide birth control,[5] 83% provide pregnancy counseling, 88% provide emergency contraception, 80% provide testing for sexually transmitted diseases, 51% provide adoption counseling and referrals, 66% provide cancer screening, 49% provide services relating to menopause, 60% provide HIV/AIDS testing, and 21% provide pre-natal care).

---

[5] Petitioners are also opposed to the use of birth control. *See, e.g.*, Pls' Ex. 519 at 3.

II. THE NATIONWIDE INJUNCTION IS NECESSARY TO PROTECT CLINICS FROM VIOLENCE

The nationwide injunction issued in this case pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, is a critical tool for providers struggling to protect themselves from anti-abortion extremist violence that continues to threaten the existence of many women's health care clinics. This Court should affirm the injunction.

A. PLAN AND OPERATION RESCUE USED VIOLENCE TO SHUT WOMEN'S HEALTH CARE CLINICS

In granting the injunction, the District Court listed several acts of violence committed by PLAN and Operation Rescue members, including trapping clinic staff and volunteers against entrances as the volunteers and staff pleaded to be set free; banging on the car of a patient and grabbing her as she tried to enter the clinic; forcibly entering a clinic and destroying medical equipment, tearing down cabinets, and chaining themselves to an operating table; trapping clinic staff and escorts against entrance doors for hours; and assaulting a patient in California who lost consciousness, bled, and was rushed to the hospital. *NOW v. Scheidler*, No. 86-C788, 1999 U.S. Dist. LEXIS 11980, at *6-11 (N.D. Ill. July 28, 1999). As one witness described it:

> Mr. Joseph Scheidler entered our building in Delaware, stormed up the steps with two or three other men with him, came in and stormed his way into our administrator's office, said he was there to "case the joint" and told her that she needed to find another job. . . . I was present at

> the protest that he had organized and was speaking to the next day, and he had threatened me at that time that he would make sure the clinic was closed down, that he was there to make Delaware an abortion-free state, that our business would be closed, that I would feel the pain and fear that he had announced.

Test. of Susan Hill, Trial Tr., at 663-64, 668. The day after Scheidler "cased" the Delaware clinic, "a protest occurred and PLAN members entered the clinic and caused considerable property damage by destroying equipment. PLAN reported this protest in its newsletter and other public relations materials as a 'fun time.'" *NOW v. Scheidler*, 1999 U.S. Dist. LEXIS 11980, at *17.

Similarly, the Court of Appeals found that the "record is replete with evidence of instances in which [petitioners'] conduct crossed the line from protected speech into illegal acts, including acts of violence." *NOW v. Scheidler*, 267 F.3d 687, 700 (7th Cir. 2001). The Court of Appeals also noted petitioners' tactic was to threaten clinics that unless a clinic shut down voluntarily, it would be closed by the petitioners' actions. *Id.* In addition, the jury found that the petitioners committed 117 acts of extortion and 4 acts of violence as part of their campaign to close down women's clinics. *Id.*

B. INJUNCTIONS ARE A WELL ESTABLISHED, EFFECTIVE METHOD TO ENSURE ACCESS TO CLINICS

Enjoining violence, blockades, invasions, harassment, and noise are well established, effective means of protecting women's health clinics. *See, e.g., Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994). Both clinics and law

enforcement officials credit injunctions with limiting violence. In a Government Accounting Office survey, several clinics and law enforcement respondents pointed to injunctions as a reason that anti-abortion violence had been reduced. United States General Accounting Office, *Abortion Clinics, Information on the Effectiveness of the Freedom of Access to Clinic Entrances Act*, GAO Report No. GGD-99-2, 13-14 (Nov. 1998).

Other courts faced with the tactics of the petitioners and their organizations consistently have found that these petitioners committed violent acts in their attempts to limit women's access to reproductive health care and have issued injunctions against them. *See, e.g., Operation Rescue v. Planned Parenthood*, 975 S.W.2d 546, 550 (Tex. 1998); *Planned Parenthood of Mass. v. Blake*, 631 N.E.2d 985, 990-91 (Mass.), *cert. denied*, 513 U.S. 868 (1994); *Fargo v. Lambs of Christ*, 488 N.W.2d 401, 406 (N.D. 1992); *Ne. Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57, 59 (3d Cir. 1991), *cert. denied*, 493 U.S. 901 (1989); *City of Atlanta v. Operation Rescue*, Pls' Ex. 926, *City of Atlanta v. Operation Rescue,* No. D-61462 (Superior Court of Fulton County, Mar. 28, 1990).

Injunctions were issued against those attacking the clinics in all of these cases. As in those cases, the injunction in this case is crucial in protecting the rights of clinic workers and patients, and preventing petitioners and their organizations from resuming their attacks against reproductive health care clinics. Removing the District Court's injunction would embolden the lawlessness of PLAN and its associates and would waste precious law enforcement and judicial resources by forcing clinics, prosecutors, and police to bring individual suits to protect individual facilities.

C. THE PETITIONERS' NATIONWIDE CAMPAIGN REQUIRES A NATIONWIDE RESPONSE

A nationwide problem requires a nationwide solution. From its inception, PLAN's nationwide scope set it apart from prior anti-abortion activities; PLAN's goal was to shut down women's clinics across the country. Pls' Ex. 4A; Trial Tr., at 976 (Test. of Maureen Burke, Coordinator of NOW's Project Stand Up for Women) (describing NOW's monitoring of Scheidler's and PLAN's activities). In a fundraising letter, Scheidler claimed to have visited forty cities within the United States, organized the first national "activist" anti-abortion conference, and met in Rome, Italy, with representatives from thirty-four countries. Pls' Ex. 650. As described by Scheidler in 1984, "I think it was a very good thing for us to get together in Fort Lauderdale and organize this kind of pro-life mafia to work in concert on important activists programs. I think we are obliged to give strong leadership to all the new people who want to get active." Pls' Ex. 647. The schedule of PLAN's activities in 1984-1985 included numerous nationwide action days. Pls' Ex. 721.

Similarly, Operation Rescue, a petitioner in this case, advertised its actions on a national scale and organized attacks throughout the country. S. Rep. No. 103-117, *supra*, at 12-13 (Test. of former Attorney General Janet Reno, noting that "much of the activity had been orchestrated by groups functioning on a nationwide scale including, but not limited to Operation Rescue, whose members and leadership have been involved in litigation in numerous areas of the country"; Test. of former New York Attorney General Robert Abrams describing litigation brought by his office against Operation Rescue leaders from California, Georgia, Virginia, and elsewhere).

Faced with an unprecedented nationwide attack strategy, the clinics and NOW sought to defend themselves with a nationwide lawsuit seeking a nationwide remedy. Use of federal law and federal courts for this action was the logical response to the national scope of the attacks and a reflection of the fact that the patchwork of state laws, coupled in some cases by lax or nonexistent enforcement of those laws, did not provide adequate coverage for individual clinics or the women who attempted to use them for health care. *Id.* at 13, 19.

The District Court's nationwide injunction must stay in place even though FACE has passed. It is important to point out that the campaign of terror against abortion providers waged by the petitioners well preceded the passage of FACE and is certainly persisting beyond it. Indeed, the District Court specifically found that petitioners' blockades and attacks on clinics had continued even with FACE in place. *NOW v. Scheidler*, 1999 U.S. Dist. LEXIS 11980, at *51-52. The court concluded that a nationwide injunction was necessary because of the national scope of petitioners' activities, petitioners' willingness to cross state lines to close abortion clinics, and the "blitzkrieg" nature of petitioners' actions that made obtaining individual FACE injunctions difficult. *Id.* at *52.

III. PETITIONERS VIOLATED THE HOBBS ACT WHEN THEY COMMITTED AND THREATENED PHYSICAL VIOLENCE IN ORDER TO OBSTRUCT AND DELAY COMMERCE IN REPRODUCTIVE HEALTH SERVICES

As described in Section II.A., *supra*, in the mid-1980's, Joseph Scheidler and his associates engaged in a campaign to terrorize abortion providers, women's health

care clinic staff, and patients. These activities went far beyond legitimate political protest, and included forcible violent blockades and invasions of women's reproductive health care clinics throughout the country. These activities were part of a comprehensive plan to obstruct and delay the provision of reproductive health services. It is indisputable that the provision of reproductive health services is a large and crucial component of the interstate commerce in health services generally, and also indisputable that petitioners' actions obstructed, delayed, and otherwise inhibited the provision of those services.

In response to this nationwide onslaught, respondents sued petitioners in the United States District Court for the Northern District of Illinois, seeking a nationwide remedy in the form of an injunction. Respondents sought this injunction in part under the provisions of the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-68. After this Court held that the respondents' claims could go forward under RICO, *see NOW v. Scheidler*, 510 U.S. 249 (1994) (*NOW I*), a six-member jury found that petitioners had engaged in 121 predicate acts under RICO. The District Court entered a permanent nationwide injunction based on these findings.

A. THIS COURT HAS NOT YET ADDRESSED WHETHER THREATS AND VIOLENCE CONSTITUTE AN INDEPENDENT BASIS FOR HOBBS ACT LIABILITY

In *NOW II*, this Court held that petitioners' actions did not violate the Hobbs Act's narrow definition of extortion, and that the nationwide injunction could not be based on any of the jury's extortion-related findings.

Scheidler v. NOW, 537 U.S. 393 (2003). This Court did not rule on the remainder of the jury's verdict, however. In addition to the findings with regard to extortion, the jury also found that the petitioners had committed four "acts or threats of physical violence to any person or property." *See NOW v. Scheidler*, 91 Fed. Appx. 510, 511-12 (7th Cir. Feb. 26, 2004) (unpublished op.). These acts relate to a portion of the Hobbs Act that was not at issue in *NOW I* or *NOW II*. *NOW I* dealt only with RICO itself, and *NOW II* involved only the portion of the Hobbs Act that prohibits obstruction of interstate commerce "by robbery or extortion." *See* 18 U.S.C. § 1951(a). The additional four acts not at issue in *NOW II* involve the portion of 18 U.S.C. § 1951(a) that prohibits obstruction of interstate commerce by someone who "commits or threatens physical violence." *Id.* As the Court of Appeals properly noted, this Court's opinion in *NOW II* did not mention the four acts of threats and violence, and the parties' briefs in that appeal referred to the acts only in passing in footnotes. *Scheidler*, 91 Fed. Appx. at 513.

This Court's entire legal analysis in *NOW II* related to the scope of the first prong of the Hobbs Act. The singular focus of this Court's *NOW II* opinion is on the meaning of the term "extortion." Nothing the Court said about the interpretation of the Hobbs Act in that opinion in any way relates to the key terms in the second prong of 18 U.S.C. § 1951(a): "commits or threatens physical violence." Although the Court's legal analysis in *NOW II* does not relate to the second prong of the statute, the facts noted by the Court in *NOW II* are relevant to the "commits or threatens physical violence" as well as to the "robbery or extortion" prong of the Act. As noted in *NOW II*, "[t]here is no dispute in these cases that petitioners interfered with,

disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights. Likewise, petitioners' counsel readily acknowledged at oral argument that aspects of his clients' conduct were criminal." *NOW II*, 537 U.S. at 408-09. Thus, as a factual matter this Court has already recognized that petitioners have committed and threatened physical violence, which had the effect of obstructing respondents' activities in interstate commerce.

Given the four jury findings not at issue in *NOW II*, as well as this Court's recognition that the petitioners engaged in violent criminal acts that disrupted respondents' businesses, the only remaining question is whether the Hobbs Act violations described by the statutory terms "commits or threatens physical violence" are distinctive from those described by the statutory terms "robbery or extortion."

B. THE TEXT OF THE HOBBS ACT REQUIRES TREATING THE "COMMITS OR THREATENS PHYSICAL VIOLENCE" OFFENSE AS DISTINCT FROM THE "ROBBERY OR EXTORTION" OFFENSE

Any dispute over statutory meaning "begins where all such inquiries must begin: with the language of the statute itself . . . In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

This Court has repeatedly expressed its "reluctance to treat statutory terms as surplusage." *Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. 687, 698 (1995). *See also ASARCO, Inc. v. Kadish*, 490 U.S. 605, 629 (1989) (rejecting a suggested interpretation of statutory language that would "render that language redundant," and requiring a reading that gives different statutory terms independent meaning); *Potter v. United States*, 155 U.S. 438, 446 (1894) (statutory term "cannot be regarded as mere surplusage; it means something"). Petitioners' argument in this case violates these interpretive principles by subsuming the "physical violence" prohibition of the Hobbs Act into the "robbery or extortion" portion of the Act. The only way to avoid this redundant reading of the Act is to give the "physical violence" language a meaning independent of the Act's other provisions. This is contrary to neither the Act's grammar nor its history.

Section 1951(a) of the Hobbs Act provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). This section of the Hobbs Act contains three distinct components. The first component describes the scope of economic activities covered by the statute. Thus, behavior is prohibited only if it "obstructs, delays, or affects commerce or the movement of any

article or commodity in commerce." The second and third components of Section 1915(a) then describe two distinctive categories of prohibited behavior. The first category of prohibited behavior includes robbery, extortion, and attempts or conspiracies to engage in robbery and extortion. The second category of prohibited behavior includes acts and threats of physical violence to persons or property "in furtherance of a plan or purpose to do anything in violation of this section." *Id.*

By attempting to subsume the second category of prohibited behavior into the first, the petitioners effectively render the Act doubly redundant. First, under petitioners' interpretation, the "commits or threatens physical violence" language is redundant because the terms "robbery or extortion" already cover both nonviolent and violent manifestations of those prohibited acts. Second, the petitioners' interpretation would render redundant the statutory language "physical violence . . . in furtherance of a plan or purpose to do anything in violation of this section" because the "robbery or extortion" provision already covers anyone who "attempts or conspires" to engage in robbery or extortion. Thus, violence that occurs as part of a plan to commit robbery or extortion is already covered by the language prohibiting attempts and conspiracies. Under petitioners' interpretation, Congress could have omitted entirely the "commits or threatens physical violence" language without in any way changing the scope of Section 1951(a).

The only way to avoid this unacceptable result is to treat acts and threats of physical violence as an independent violation distinct from robbery and extortion. This interpretation is grammatically more consistent with the

phrasing of the Hobbs Act than petitioners' redundant reading.

First, the "commits or threatens physical violence" language of the Act is separated by a comma from the "robbery or extortion" language, indicating a distinction between the two components of the statute. *See Ron Pair Enters., Inc.*, 489 U.S. at 241 (discussing the grammatical structure of a statute, and noting that phrases set apart by commas "stand[] independent of the language that follows").

Second, the phrasing of the statute is disjunctive. The "robbery or extortion" and "commits or threatens physical violence" violations are joined by the word "or," which again indicates that the two sets of prohibited behaviors are mutually exclusive and independent violations of the Act. "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). To paraphrase this Court's conclusion in *Reiter*, Congress's use of the word "or" makes plain that the phrase "robbery or extortion" was not intended to modify the phrase "commits or threatens physical violence" nor was "commits or threatens physical violence" intended to modify "robbery or extortion." *See id.*

Finally, the phrase "in furtherance of a plan or purpose to do anything in violation of this section" logically refers to the Act's primary objective of prohibiting any action that "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce," since violence occurring in conjunction with conspiracies,

attempts, and acts of robbery and extortion would already be covered by the robbery and extortion portion of the Act.

C. THE LEGISLATIVE HISTORY OF THE HOBBS ACT SUPPORTS TREATING THREATS AND VIOLENCE AS A SEPARATE OFFENSE FROM EXTORTION AND ROBBERY

The plain language of the Hobbs Act prohibits anyone from committing or threatening acts of physical violence to person or property if those acts or threats would obstruct, delay, or affect interstate commerce. Nothing in the statutory language links this prohibition to the separate offense of obstructing commerce by acts of robbery and extortion. Since the statutory language is clear, no further interpretive effort is required to determine the meaning of the statutory terms.

> As in all statutory construction cases, we begin with the language of the statute. The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." . . . The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'"

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

Despite the clear application of the Hobbs Act statutory language to the violent and threatening acts in this case, petitioners nevertheless argue that this Court should ignore the statutory language creating a separate category of obstructions and subsume the prohibition of violence and threats into the prohibition of robbery and extortion.

Nothing in the legislative history supports this interpretation.

The legislative history is silent on the reason Congress prohibited violent and threatening acts obstructing commerce. Much of the history of the Hobbs Act is recounted in this Court's opinion in *NOW II*. In short, the Hobbs Act was preceded by the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979. The Anti-Racketeering Act, in turn, was based on several provisions of the New York Penal Code and the Field Code. *See NOW II*, 537 U.S. at 403. In 1946, Congress enacted the Hobbs Act, in response to this Court's interpretation of the Anti-Racketeering Act in *United States v. Teamsters*, 315 U.S. 521 (1942). *See United States v. Enmons*, 410 U.S. 396, 401-04 (1973). The 1946 version of the Hobbs Act broadened the coverage of the statute to encompass extortionate union activity, which this Court's *Teamsters* decision had held was exempted from the provisions of the 1934 statute. *Id.* Finally, in 1948 Congress revised the statute again, producing the current phrasing of the Act. 18 U.S.C. § 1951(a).

The phrasing of the prohibition on threats or acts of violence that obstruct commerce is somewhat different in the 1934, 1946, and 1948 Acts. The 1934 Act separated the different types of violations into three different statutory subsections. All three subsections prohibited some aspect of threats or violence, and all references to threats and violence were specifically linked to extortionate activity. *See* Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979, § 2(a)-(c). The 1946 Act also separated the different types of violation into separate subsections, and the reference to violence in that Act also specifically linked prohibited threats or violence to acts of robbery or extortion. *See* Hobbs Anti-Racketeering Act of 1946, ch. 537, 60 Stat. 420,

§§ 2-5. In the 1948 revision, however, Congress combined the various prohibited activities into one provision, and rephrased the prohibition of threats and violence to omit the linkage to acts of robbery or extortion. *See* 18 U.S.C. § 1951(a).

Congress's general theme in all three of these statutes is the same: to protect interstate commerce by proscribing illegal and violent actions that obstruct commerce. The title of the 1948 revision makes this clear: According to the title, the Act prohibits "Interference with commerce by threats or violence." Likewise, during the debate over the 1946 revision, Representative Hancock responded to objections that the statute would potentially cover peaceful labor activity by noting that "This bill merely prohibits the wrongful use of force or threats. That cannot apply to a threatened strike because strikes are lawful, they are not wrongful." 91 Cong. Rec. 11902 (1945). In discussing Congress's authority to enact the Hobbs Act, this Court held that the Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence," and notes that the Act "outlaws such interference 'in any way or degree.'" *Stirone v. United States*, 361 U.S. 212, 215 (1960).

Although the legislative history is silent on Congress's reason for prohibiting all threats and acts of violence in the 1948 revision, it is not difficult to extrapolate the reason from Congress's broad intent to protect commerce from violent and illegal actions. The description in Section I., *supra*, of the comprehensive effects of threats and violence on the lawful provision of abortion and other reproductive health services provides an illustration of

how commerce can be obstructed—and indeed halted altogether—by such activities.

None of petitioners' remaining arguments justify their assertion that the Hobbs Act prohibition of threats and acts of violence should not be read as it is written.

First, petitioners assert that interpreting the Hobbs Act as it is written would "convert the Hobbs Act into a breathtakingly broad general federal 'anti-violence' statute." Operation Rescue Br. at 14. This claim is incorrect because it ignores the crucial and narrow limitation on prosecutions under the Hobbs Act: the Act applies only to acts or threats of violence that are part of a plan or purpose to obstruct, delay, or affect commerce. Ordinary acts and threats of violence do not come within the scope of the Act.

Second, petitioners assert that interpreting the Hobbs Act as it is written would "render superfluous numerous other federal statutes that address violence to persons or property in a more tailored manner." Operation Rescue Br. at 15. *See also* Scheidler Br. at 30. As noted above, the Hobbs Act is itself narrowly tailored to acts and threats of violence that are directed at obstructing, delaying, or affecting commerce. To the extent that the Hobbs Act covers actions also covered by other existing federal statutes, this is no different than the current state of affairs with regard to statutes other than the Hobbs Act. Notwithstanding the Hobbs Act, for example, there are multiple federal statutes prohibiting threats, and many of those statutes would cover the same conduct.[6] This Court

---

[6] *See* 18 U.S.C. § 871 (making it a crime to threaten president or successor to presidency); 18 U.S.C. § 873 (making it a crime to blackmail); 18 U.S.C. § 875 (making it a crime to make a threat through

(Continued on following page)

has never suggested that if Congress regulates a particular illegal activity in one statute, then all other statutes regulating the same activity are invalid.

Third, petitioners assert that interpreting the Hobbs Act as it is written would upset the balance of federal/state relations by "federalizing such traditional state offenses such as assault, battery, and destruction of private property." Operation Rescue Br. at 16. *See also* Scheidler Br. at 30. Once again, this ignores the crucial Hobbs Act limitation to acts obstructing, delaying, or affecting commerce. In any event, the fact that both the federal and state governments regulate criminal behavior does not justify invalidating legitimate Congressional action on a matter over which it has specific constitutional authority. As recently as five months ago, this Court reaffirmed Congress's authority to enact and enforce the Controlled Substances Act, 21 U.S.C. §§ 801-971, which criminalizes behavior that is also the subject of comprehensive regulation in every state. *Id.* "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a

---

interstate communications); 18 U.S.C. § 876 (making it a crime to make a threat through the U.S. mail); 18 U.S.C. § 877 (making it a crime to make a threat through communications from foreign country); 18 U.S.C. § 878 (making it a crime to threaten foreign officials); 18 U.S.C. § 879 (making it a crime to threaten former presidents); 15 U.S.C. § 1692d(1) (making it a crime to threaten physical harm during the collection of a debt); 18 U.S.C. § 601 (making it a crime to threaten deprivation of employment or other benefit for political contribution); 18 U.S.C. § 844(e) (making it a crime to threaten the use of an explosive); 18 U.S.C. § 1030 (making it a crime to threaten harm to a government protected computer); 19 U.S.C. § 1341 (making it a crime to interfere with the function of an International Trade Commission employee by way of a threat); 42 U.S.C. § 300i-1(b) (making it a crime to threaten to tamper with public drinking water).

substantial effect on interstate commerce." *Gonzales v. Raich*, 125 S.Ct. 2195, 2205 (2005). There is little question that the regulation of acts and threats of violence that have the effect of stymieing an entire national industry falls within Congress's regulatory authority under the Commerce Clause—even if those activities are also subject to regulation by the states.

Fourth, petitioners argue that if the Hobbs Act is interpreted as it is written, it would lead to the pursuit of RICO actions "against social and labor protesters of all stripes, at least if acts (or perceived threats) of violence or property damage occur during protests." Scheidler Br. at 31. This claim rings hollow in the context of the facts of this case, in which petitioners' counsel conceded that petitioners engaged in criminal conduct directed at respondents. *See NOW II*, 537 U.S. at 408-09. As to other protesters, the Hobbs Act is subject to the same First Amendment limitations as all other federal statutes. *See, e.g., Watts v. United States*, 394 U.S. 705 (1969) (limiting prosecution under federal threats statute to a "true threat," and prohibiting the prosecution of ostensibly threatening language that amounted to mere political hyperbole). Legitimate political protest is not covered by the Hobbs Act and is not put at risk by the injunction in this case.

In sum, none of petitioners' arguments can overcome the clear mandate of the statutory language in this case. The facts and law are both clear: petitioners violated the Hobbs Act and should be enjoined.

CONCLUSION

This Court should affirm the lower courts' efforts to enforce the Hobbs Act and the imposition of a nationwide injunction against further violations of the Act.

Respectfully submitted,

STEVEN G. GEY*
Florida State University
College of Law
425 West Jefferson
Tallahassee, FL 32306
(850) 644-5467

Counsel of Record

Supreme Court, U.S.
FILED
OCT 21 2005
OFFICE OF THE CLERK

Nos. 04-1244 & 04-1352

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR 47 MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JON B. EISENBERG
Counsel of Record
HORVITZ & LEVY LLP
15760 Ventura Boulevard, 18th Floor
Encino, California 91436-3000
(818) 995-0800

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. WHEN INTERPRETING FEDERAL STATUTES, THE SUPREME COURT ACTS AS THE "FAITHFUL AGENT" OF CONGRESS, REMAINING TRUE TO THE LEGISLATORS' WILL 3

A. Faithful Agency Has Deep Roots in this Court's Jurisprudence 3

B. Faithful Agency Is Essential to the Constitutional Separation of Powers 5

II. FAITHFUL AGENCY REQUIRES ADHERENCE TO PLAIN STATUTORY LANGUAGE ... 6

A. The Plain Meaning Rule Precludes Resort to Legislative History Absent Statutory Ambiguity 6

B. The Plain Meaning Rule Is Essential to Congress's Optimal Performance 7

1. The rule provides an incentive for Congress to speak plainly 8

2. The rule discourages manipulation of the legislative record to promote individual lawmakers' agendas 8

3. The rule gives Congress a background of reliable judicial interpretation upon which Congress may depend to legislate 9

TABLE OF CONTENTS – Continued

Page

4. The rule militates against this Court acting as Congress's taskmaster 10

III. THE PLAIN-MEANING CONSTRUCTION OF THE HOBBS ACT AS ENCOMPASSING ACTS OR THREATS OF VIOLENCE TARGETING INTERSTATE COMMERCE IS CONSISTENT WITH BOTH TEXTUALIST AND INTENTIONALIST APPROACHES TO STATUTORY INTERPRETATION 11

A. Textualism and Intentionalism Use the Same Methodology and Yield the Same Result Here 11

B. The Text of § 1951(a) Plainly Makes it a Crime to Commit or Threaten Violence Targeting Interstate Commerce 12

C. The Context of the Hobbs Act – Its Title – Verifies Its Plain Meaning 14

IV. THE PLAIN-MEANING CONSTRUCTION OF THE RICO ACT AS AUTHORIZING INJUNCTIVE RELIEF IN PRIVATE ACTIONS IS CONSISTENT WITH BOTH TEXTUALIST AND INTENTIONALIST APPROACHES TO STATUTORY INTERPRETATION 15

V. THE LEGISLATIVE HISTORIES OF § 1951(a) AND § 1964(a) NEED NOT BE INVESTIGATED 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 14

Caminetti v. United States, 242 U.S. 470 (1917) 7

Chisom v. Roemer, 501 U.S. 380 (1991) 7

Ex Parte Collet, 337 U.S. 55 (1949) 6

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 7

Finley v. United States, 490 U.S. 545 (1989) 9

Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1979) 12

Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 6

Rector of Holy Trinity Church v. United States, 143 U.S. 457 (1892) 14

Smith v. United States, 508 U.S. 223 (1993) 14

Stirone v. United States, 361 U.S. 212 (1960) 13

Tennessee v. Lane, 541 U.S. 509 (2004) 10

United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805) 14

United States v. Goldenberg, 168 U.S. 95 (1897) 4

United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818) 4, 14

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) 6, 14

W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 1951 ..... 12, 13, 14, 15

18 U.S.C. § 1964 15

MISCELLANEOUS

Stephen Breyer, Active Liberty (2005) 3

Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61 (1994) 3

William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990) 11

William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321 (1990) 3

Bradford C. Mann, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 Ky. L.J. 527 (1997) 12

John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001) 3, 4, 5, 8, 14

Miranda Oshige McGowan, *Against Interpretation*, 42 San Diego L. Rev. 711 (2005) 9

Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U.L.Q. 351 (1994) 11, 12

Roscoe Pound, *The Theory of Judicial Decision*, 36 Harv. L. Rev. 940 (1923) 5

Antonin Scalia, A Matter of Interpretation (1997) 11

TABLE OF AUTHORITIES – Continued

Page

Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405 (1989) 4

Laurence H. Tribe, Comment, *in* Antonin Scalia, A Matter of Interpretation (1997) 6

Adrian Vermeule, *Three Strategies of Interpretation*, 42 San Diego L. Rev. 607 (2005) 7

Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 Va. L. Rev. 1295 (1990) 4

BRIEF FOR 47 MEMBERS OF THF UNITED STATES CONGRESS AS *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

Amici curiae are Members of the United States House of Representatives. Their names, their political affiliations, and the Congressional Districts they represent are listed in the Appendix to this brief. Each Member believes that judicial interpretation of legislation according to plain statutory language is essential to the Constitutional separation of powers by which Congress and the federal judiciary work together as co-equal branches of government. Each Member believes that the statutes at issue in this case speak in plain language, to which this Court should faithfully adhere, making it a crime under the Hobbs Act to commit or threaten violence targeting interstate commerce and authorizing the federal courts to enjoin such conduct in private RICO Act lawsuits.[1]

SUMMARY OF ARGUMENT

When interpreting federal statutes, this Court acts as the "faithful agent" of Congress, with the judiciary and the legislature functioning as co-equal partners in the

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* or their counsel, make a monetary contribution to the preparation or submission of this brief. The consent of the parties to the filing of *amici curiae* briefs has been obtained and filed with the Clerk of the Court.

governance of our Nation. Such faithful agency is essential to the Constitutional separation of powers, for it prevents judicial encroachment on Congress's lawmaking role.

Faithful agency requires judicial adherence to plain statutory language, without resort to legislative history absent statutory ambiguity. This is essential to Congress's optimal performance. It provides an incentive for Congress to speak plainly; it discourages manipulation of the legislative record to promote individual lawmakers' agendas; it gives Congress a background of reliable judicial interpretation upon which Congress may depend to legislate; and it militates against this Court acting as Congress's taskmaster.

Interpreting the Hobbs Act as encompassing acts or threats of violence targeting interstate commerce, and interpreting the RICO Act as authorizing injunctive relief in private actions, is consistent with both of two competing theories of statutory interpretation – textualism and intentionalism. Both theories use the same methodology and yield the same result where, as here, statutory language is unambiguous. The text of the Hobbs Act plainly makes it a crime to commit or threaten violence in furtherance of a plan or purpose to obstruct, delay, or affect interstate commerce. The text of the RICO Act plainly authorizes the district courts to address RICO violations with injunctive relief. Thus, the legislative history of those Acts need not be investigated, whether one is a textualist or an intentionalist. Congress has spoken plainly; this Court should listen.

ARGUMENT

I. WHEN INTERPRETING FEDERAL STATUTES, THE SUPREME COURT ACTS AS THE "FAITHFUL AGENT" OF CONGRESS, REMAINING TRUE TO THE LEGISLATORS' WILL.

A. Faithful Agency Has Deep Roots in this Court's Jurisprudence.

It is axiomatic that Congress and the federal judiciary are co-equals in the governance of our Nation, with the Constitution drawing clear lines of demarcation between the legislative and judicial branches. Essential to this partnership is the notion of "faithful agency" – that the Supreme Court of the United States is neither the subordinate nor the taskmaster of Congress, but its partner in implementing legislation. "In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents. On that assumption, if Congress legislates within constitutional boundaries, the federal judge's constitutional duty is to decode and follow its commands, particularly where they are clear." John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 5 (2001) (footnote omitted).

This assumption is shared by legal commentators across the jurisprudential spectrum. *See, e.g.*, Stephen Breyer, Active Liberty 86 (2005) (explaining that Founders expected judges, when applying codified law, "would remain faithful to the legislators' will"); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 63 (1994) ("We are supposed to be faithful agents, not independent principals."); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 325 (1990) (describing intentionalist theory

that "Court acts as the enacting legislature's faithful servant, discovering and applying the legislature's original intent."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature."); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 Va. L. Rev. 1295, 1313 (1990) ("Traditional democratic theory suggests that the court interpreting a statute must act as the faithful agent of the legislature's intent.").

Faithful agency is rooted in this Court's earliest jurisprudence – that of the Marshall Court – which "regarded federal judges as faithful agents of the legislature." Manning, *supra*, at 99. Thus, for example, as early as 1818, Chief Justice John Marshall explained that "when the legislature manifests [a] clear understanding of its own intention, which intention consists with its words, courts are bound by it." *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818). The primacy of faithful agency was well settled by the end of the nineteenth century. Manning, *supra*, at 102-05; *see, e.g., United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. . . . The courts have no function of legislation, and simply seek to ascertain the will of the legislator.").

"Hence, questions about the appropriate method of statutory interpretation must be debated, as they have been for the past century, on the assumption that, in matters of federal statutory interpretation, the federal

judge must act as the faithful agent of Congress." Manning, *supra*, at 127.

B. Faithful Agency Is Essential to the Constitutional Separation of Powers.

Faithful agency is a function of the Constitutional separation of powers. Its converse – unbridled latitude in statutory interpretation – leads to judicial encroachment on Congress's lawmaking role. "[T]he dogma of separation of powers . . . refers lawmaking exclusively to the legislature and would limit the courts to interpretation and application." Roscoe Pound, *The Theory of Judicial Decision*, 36 Harv. L. Rev. 940, 946 (1923). Thus, "when the Supreme Court assimilated the lessons of the separation of powers early in the nineteenth century, the faithful agent theory ultimately came to be its dominant interpretive methodology." Manning, *supra*, at 127.

> The Constitution does not generally prescribe rules of construction. But because all statutory interpretation is 'an interbranch encounter of sorts,' selecting an appropriate interpretive methodology involves inevitable choices about the institutional allocation of power between courts and legislatures. To the extent that our constitutional structure reflects considered judgments about that allocation of such power, it is essential to adopt rules of statutory interpretation that further, rather than detract from, the structural objectives established by the constitutional design.

Manning, *supra*, at 56-57 (footnotes omitted).

Congress rightly expects that the Supreme Court, acting as Congress's faithful agent, will remain true to the

constitutional separation of powers by following the plain language of federal statutes.

II. FAITHFUL AGENCY REQUIRES ADHERENCE TO PLAIN STATUTORY LANGUAGE.

A. The Plain Meaning Rule Precludes Resort to Legislative History Absent Statutory Ambiguity.

Faithful agency requires judicial respect for the plain meaning of statutory language. As Chief Justice Marshall said long ago, "Where there is no ambiguity in the words, there is no room for construction." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820). And as Justice Brennan said more recently, "A statute is not 'a nose of wax to be changed from that which the plain language imports. . . .'" *Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 518 (1979) (Brennan, J., dissenting).

The plain meaning rule restricts resort to extrinsic interpretative aids such as legislative history. "[T]here is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.'" *Ex Parte Collet*, 337 U.S. 55, 61 (1949); *see also* Laurence H. Tribe, Comment, *in* Antonin Scalia, A Matter of Interpretation 66 (1997) ("[I]t is the *text's* meaning, and not the content of anyone's expectations or intentions, that binds us as law."). "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true

meaning of the legislature in cases of doubtful interpretation," but "when words are free from doubt they must be taken as the final expression of the legislative intent. . . ." *Caminetti v. United States*, 242 U.S. 470, 490 (1917).

This is a "stopping rule" for the courts. "[T]he interpreter stops searching for further evidence of legislative intentions when the statutory text is clear. Further search, into legislative history for example, is permissible only when the statutory text is ambiguous or otherwise lacks a plain meaning." Adrian Vermeule, *Three Strategies of Interpretation*, 42 San Diego L. Rev. 607, 614-15 (2005); *see, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("[T]he beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.").

B. The Plain Meaning Rule Is Essential to Congress's Optimal Performance.

The Members of Congress have certain reasonable expectations of their co-equal partner in governance, the federal judiciary. One of those expectations is that the courts will operate as a check on the constitutionality of legislation through exercise of the power of constitutional review. Equally fundamental to our system of checks and balances, however, is the expectation of faithful adherence to the text of federal legislation. Implicit in that expectation is that the judiciary will "read the words of that text as any ordinary Member of Congress would have read them." *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

The Members of Congress expect judicial respect for the plain meaning rule, and they rely on this expectation to do their job well.

1. The rule provides an incentive for Congress to speak plainly.

Legislating in plain language is good lawmaking. It promotes predictability and stability in the law, and it is one of the intended benefits of the constitutional separation of powers. Separation-of-power theorists among the Founders "argued that the separation of lawmaking from judging would give legislatures an important incentive to enact clear and constraining laws, rather than granting the judiciary excessive discretion through the statutes enacted." Manning, *supra*, at 67. Plain-language legislating prevents judicial encroachment into legislative functions, which is threatened when legislation is vague.

Judicial adherence to the plain meaning rule encourages the Members of Congress to legislate in plain language, which is good for national governance in both theory and practice.

2. The rule discourages manipulation of the legislative record to promote individual lawmakers' agendas.

The more courts resort to legislative history as an aid to statutory interpretation, the more individual lawmakers might be encouraged to manipulate the legislative record to include material that might not provide reliable clues to the intent of Congress as a whole but instead promote individual views that may or may not have been shared by other Members. Some have argued that "the

practice of consulting legislative history encourages the strategic, surreptitious shaping of the legislative record to favor a particular gloss on the statute, rendering those materials unreliable indicia of intent." Miranda Oshige McGowan, *Against Interpretation*, 42 San Diego L. Rev. 711, 730-731 (2005).

Faithful adherence to the plain meaning rule discourages such manipulation of the legislative record. Given the inherent imprecision of language, legislators cannot always avoid ambiguity which requires an examination of legislative history. But the more the courts look solely to plain language, and the less they resort to legislative history, the less likely it will be that individual lawmakers are tempted to play games with the legislative record.

3. The rule gives Congress a background of reliable judicial interpretation upon which Congress may depend to legislate.

It is of "paramount importance" to Congress that its Members "be able to legislate against a background of clear interpretive rules, so that [Congress] may know the effect of the language it adopts." *Finley v. United States*, 490 U.S. 545, 556 (1989). Of those interpretive rules, the clearest is the plain meaning rule. Faithful adherence to that rule gives Members of Congress a solid foundation for good legislating, secure in the knowledge that their use of plain language will avoid blurring the separation of powers.

4. The rule militates against this Court acting as Congress's taskmaster.

This Court is not subordinate to Congress; nor vice versa. The two branches of government are co-equal partners. Consequently, this Court should eschew jurisprudence that "casts this Court in the role of Congress's taskmaster" where the Court "must regularly check Congress's homework." *Tennessee v. Lane*, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting).

Legislating is a difficult business, rife with bargains and compromise. It is made all the more difficult when courts persistently demand that lawmakers explain themselves in the legislative record behind the text of the statutes themselves. Members of Congress should not be required to lard the legislative record with "homework" explaining their intent, which is the inevitable consequence of persistent straying from the plain meaning rule. The more that happens, the more difficult it becomes for Congress to do its business effectively, as litigants seize upon tidbits of legislative history in attempts to twist plain statutory language as they would wish it to read.

III. THE PLAIN-MEANING CONSTRUCTION OF THE HOBBS ACT AS ENCOMPASSING ACTS OR THRLATS OF VIOLENCE TARGETING INTERSTATE COMMERCE IS CONSISTENT WITH BOTH TEXTUALIST AND INTENTIONALIST APPROACHES TO STATUTORY INTERPRETATION.

A. Textualism and Intentionalism Use the Same Methodology and Yield the Same Result Here.

Federal judges and legal scholars have long debated the appropriate role of legislative history in statutory interpretation.

One school of thought is textualism, which disfavors resort to legislative history in determining legislative intent, preferring an effort to determine what the words of a statute objectively mean rather than what individual legislators might have subjectively intended them to mean. *See, e.g.*, Antonin Scalia, A Matter of Interpretation 16-18, 29-37 (1997); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 669 (1990); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U.L.Q. 351, 372 (1994). Justice Scalia has described textualism as follows:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* of Congress which voted on the words of the statute (not to mention the citizens subject

> to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated – a compatibility which, by a benign fiction, we assume Congress always has in mind.

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

A competing school of thought is intentionalism, which looks beyond statutory text for guidance in determining legislative intent. *See, e.g.*, Bradford C. Mann, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 Ky. L.J. 527, 529 (1997); Merrill, *supra*, at 354, 357. Justice Stevens has argued that "we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose. . . ." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting).

Textualism and intentionalism use the same methodology, however, and yield the same result, when statutory language is unambiguous. Such is the situation here.

B. The Text of § 1951(a) Plainly Makes it a Crime to Commit or Threaten Violence Targeting Interstate Commerce.

One of the statutes at issue in this case, 18 U.S.C. § 1951(a), states:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or

> purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Textualists and intentionalists need go no further than the plain language of § 1951(a) to conclude that the statute makes it a crime to commit or threaten violence in furtherance of a plan or purpose to obstruct, delay, or affect interstate commerce. We need only break the statute into its component parts:

> "Whoever in any way or degree obstructs, delays, or affects commerce or movement of any article or commodity in interstate commerce,"
>
> - "by robbery or extortion or attempts or conspires to do so, or"
> - "commits or threatens violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section"
>
> "shall be fined under this title or imprisoned not more than twenty years, or both."

The statute's use of the disjunctive "or" makes plain that a violation can occur "by robbery or extortion" *or* when the offender "commits or threatens violence" targeting interstate commerce. And that is precisely how this Court has previously read § 1951(a) – as punishing "interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U.S. 212, 215 (1960).

The language of the Hobbs Act tells both textualists and intentionalists all they need to know about legislative intent.

C. The Context of the Hobbs Act – Its Title – Verifies Its Plain Meaning.

Something else on which textualists and intentionalists agree is that "'the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *Smith v. United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting). Even textualists "acknowledge that language has meaning only in context." Manning, *supra*, at 108.

The context of § 1951(a) includes its title: "Interference with commerce by threats or violence." As far back as the Marshall era, this Court held that although the title of an act cannot trump its plain text, the title "may furnish some aid in showing what was in the mind of the legislature." *Palmer*, 16 U.S. (3 Wheat.) at 631; *see also United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (stating that title can be used to "assist in removing ambiguities"). This Court has repeatedly restated that rule. *See, e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 233-34 (1998); *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 462 (1892).

Thus, both the plain language of the Hobbs Act and its title demonstrate Congress's intent – that § 1951(a) encompasses acts or threats of violence targeting interstate commerce. Even the rule of lenity must yield to that intent. *See Wiltberger*, 18 U.S. (5 Wheat.) at 95.

IV. THE PLAIN-MEANING CONSTRUCTION OF THE RICO ACT AS AUTHORIZING INJUNCTIVE RELIEF IN PRIVATE ACTIONS IS CONSISTENT WITH BOTH TEXTUALIST AND INTENTIONALIST APPROACHES TO STATUTORY INTERPRETATION.

The other statute at issue in this case, 18 U.S.C. § 1964(a), states: "The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders. . . ." That says all a textualist or an intentionalist needs to know about the legislative intent underlying § 1964(a). This provision of the RICO Act authorizes courts to issue a restraining order – that is, injunctive relief. As with § 1951(a), there is no need to go further.

The briefs of Petitioners and the United States contend the RICO Act does not authorize injunctive relief for private parties because injunctive relief is not mentioned in the private action provisions of § 1964(c). But here again, as with the Hobbs Act, context verifies plain meaning. Subsection (c) of § 1964 does not appear in isolation, but alongside subsection (a) of the statute, which plainly authorizes the district courts to address RICO violations with injunctive relief.

V. THE LEGISLATIVE HISTORIES OF § 1951(a) AND § 1964(a) NEED NOT BE INVESTIGATED.

The briefs of Petitioners and the United States rely heavily on legislative history to advance their convoluted interpretations of § 1951(a) (including the text and history of the Hobbs Act's 1934 predecessor, the text of the Hobbs Act in its original 1946 form, House and Senate reports on

the Hobbs Act's 1948 revision, the Reviser's Notes for the 1948 revision, and even the personal comments of Representative Hobbs) and § 1964(a) (including failed competing bills, subcommittee hearings, and floor debates). Given the plain meaning of both statutes, these legislative histories need not be investigated – nor should they be.

CONCLUSION

Congress spoke plainly in 1948 when making it a crime to commit or threaten violence targeting interstate commerce, and spoke plainly in 1970 when authorizing injunctive relief for RICO violations. No less now than then, the Members of Congress need assurance that when they speak plainly, this Court listens.

Respectfully submitted,

JON B. EISENBERG
Counsel of Record
HORVITZ & LEVY LLP
15760 Ventura Boulevard,
18th Floor
Encino, California 91436-3000
(818) 995-0800

Attorneys for Amici Curiae

APPENDIX

SIGNATORIES

Rep. Louise McIntosh Slaughter (D-New York-28th Dist.)
Rep. Diana DeGette (D-Colorado-1st Dist.)
Rep. Hilda Solis (D-California-32nd Dist.)
Rep. Janice Schakowsky (D-Illinois-9th Dist.)
Rep. Tammy Baldwin (D-Wisconsin-2nd Dist.)
Rep. Shelley Berkley (D-Nevada-1st Dist.)
Rep. Lois Capps (D-California-23rd Dist.)
Rep. John Conyers (D-Michigan-14th Dist.)
Rep. Joseph Crowley (D-New York-7th Dist.)
Rep. Susan Davis (D-California-53rd Dist.)
Rep. Rosa DeLauro (D-Connecticut-3rd Dist.)
Rep. Anna Eshoo (D-California-14th Dist.)
Rep. Lane Evans (D-Illinois-17th Dist.)
Rep. Sam Farr (D-California-17th Dist.)
Rep. Chaka Fattah (D-Pennsylvania-2nd Dist.)
Rep. Raul Grijalva (D-Arizona-7th Dist.)
Rep. Jane Harman (D-California-36th Dist.)
Rep. Maurice Hinchey (D-New York-22nd Dist.)
Rep. Michael Honda (D-California-15th Dist.)
Rep. Jay Inslee (D-Washington-1st Dist.)
Rep. Jesse Jackson, Jr. (D-Illinois-2nd Dist.)
Rep. Sheila Jackson Lee (D-Texas-18th Dist.)
Rep. Eddie Bernice Johnson (D-Texas-30th Dist.)
Rep. Dennis Kucinich (D-Ohio-10th Dist.)
Rep. Rick Larsen (D-Washington-2nd Dist.)
Rep. Barbara Lee (D-California-9th Dist.)
Rep. Zoe Lofgren (D-California-16th Dist.)
Rep. Nita Lowey (D-New York-18th Dist.)
Rep. Carolyn Maloney (D-New York-14th Dist.)
Rep. Carolyn McCarthy (D-New York-4th Dist.)

Rep. Betty McCollum (D-Minnesota-4th Dist.)
Rep. James McGovern (D-Massachusetts-3rd Dist.)
Rep. Juanita Millender-McDonald (D-California-37th Dist.)
Rep. Gwen Moore (D-Wisconsin-4th Dist.)
Rep. James Moran (D-Virginia-8th Dist.)
Rep. Jerrold Nadler (D-New York-8th Dist.)
Rep. Grace F. Napolitano (D-California-38th Dist.)
Rep. Eleanor Holmes Norton (D-DC-AL)
Rep. Loretta Sanchez (D-California-47th Dist.)
Rep. Brad Sherman (D-California-27th Dist.)
Rep. Stephanie Tubbs Jones (D-Ohio-11th Dist.)
Rep. Chris Van Hollen (D-Maryland-8th Dist.)
Rep. Nydia Velazquez (D-New York-12th Dist.)
Rep. Debbie Wasserman Schultz (D-Florida-20th Dist.)
Rep. Henry Waxman (D-California-30th Dist.)
Rep. Robert Wexler (D-Florida-19th Dist.)
Rep. David Wu (D-Oregon-1st Dist.)

Supreme Court, U.S.
FILED
OCT 21 2005
OFFICE OF THE CLERK

Nos. 04-1244, 04-1352

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.
Respondents,

OPERATION RESCUE, ET AL.
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

JOHN C. BRITTAIN
MICHAEL L. FOREMAN
SARAH C. CRAWFORD
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue
Suite 400
Washington, D.C. 20005
202-662-8600

JOSEPH R. BANKOFF*
EMILY J. CULPEPPER
DAVID M. VISCOMI
CHAD A. PETERSON
LAUREN M. KOHN
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, D.C. 20006-4706
202-737-0500
**Counsel of Record*

DENNIS COURTLAND HAYES
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
4805 Mt. Hope Drive
Baltimore, MD 21215
410-580-5797

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. FIRST AMENDMENT PRINCIPLES DO NOT FAVOR A NARROWER CONSTRUCTION OF THE HOBBS ACT 6

A. A Proscription Against Acts And Threats Of Violence Reaches Only Speech And Conduct Outside The Scope of The First Amendment 8

B. The Court's Jurisprudence Ensures That A Proscription Against Acts And Threats Of Violence Cannot Punish Protected Conduct 13

II. THE COURT OF APPEALS' PRIOR HOLDING THAT RICO PROVIDES EQUITABLE REMEDIES FOR PRIVATE PLAINTIFFS IS CORRECT 15

A. The Text Of The RICO Statute Plainly Authorizes Equitable Relief For Private Parties 15

B. Public Policy Considerations Favor Allowing Private Parties To Seek Equitable Relief 20

CONCLUSION 23

TABLE OF AUTHORITIES

FEDERAL CASES

Agency Holding Corp. v. Malley-Duff & Assocs., Inc.,
483 U.S. 143 (1987) 21

Bell v. Hood,
327 U.S. 678 (1946) 16

Califano v. Yamasaki,
442 U.S. 682 (1979) 15, 16

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 11

Cohen v. California,
403 U.S. 15 (1971) 9

Cox v. Louisiana,
379 U.S. 536 (1965) 10

Giboney v. Empire Storage & Ice Co.,
336 U.S. 490 (1949) 11, 12

H.J., Inc. v. Northwestern Bell Tel. Co.,
492 U.S. 229 (1989) 21

Hill v. Colorado,
530 U.S. 703 (2000) 11

In re Managed Care Litig.,
298 F. Supp. 2d 1259 (S.D. Fla. 2003) 15

Motorola Credit Corp. v. Uzan,
202 F. Supp. 2d 239 (S.D.N.Y. 2002) 15

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) ..... *passim*

National Org. for Women, Inc. v. Scheidler,
267 F.3d 687 (7th Cir. 2001) 9, 14, 15

National Org. for Women, Inc. v. Scheidler,
396 F.3d 807 (7th Cir. 2005) 6, 7

National Org. for Women, Inc. v. Scheidler,
510 U.S. 249 (1994) 13

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 8, 9

Organization for a Better Austin v. Keefe,
402 U.S. 415 (1971) 9

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 16, 18

R.A.V. v. City of St. Paul, Minn.,
505 U.S. 377 (1992) 11

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 21

Religious Tech. Ctr. v. Wollersheim,
796 F.2d 1076 (9th Cir. 1986) 21

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 11

Rotella v. Wood,
528 U.S. 549 (2000) 20

Schenck v. United States,
249 U.S. 47 (1919) 11

Scripps-Howard Radio, Inc. v. FCC,
316 U.S. 4 (1942) 16

Sedima, S.P.R.L. v. Imrex Co.,
473 U.S. 479 (1985) 16, 21

Stewart v. McCoy,
537 U.S. 993 (2002) 12

Texas v. Johnson,
491 U.S. 397 (1989) 8

United States v. Cappetto,
502 F.2d 1351 (7th Cir. 1974) 19

United States v. Turkette,
452 U.S. 576 (1981) 16

Virginia v. Black,
538 U.S. 343 (2003) 10, 11

Wisconsin v. Mitchell,
508 U.S. 476 (1993) 10

FEDERAL STATUTES

18 U.S.C. § 1951 ..... 6, 7

18 U.S.C. § 1964 ..... 17, 18

Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) 16

MISCELLANEOUS

Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 S. Ct. Rev. 129, 143 (1994) 7

H.R. Rep. No. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034 17

BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS[1]

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") and the National Association for the Advancement of Colored People ("NAACP") respectfully submit this brief as *amici curiae* in support of the Respondents pursuant to Supreme Court Rule 37.3(a) upon the consent of the parties.[2]

INTEREST OF *AMICI CURIAE*

The Lawyers' Committee is a non-profit, non-partisan organization founded in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law.

The NAACP is a non-profit organization dedicated to ensuring the political, educational, social and economic equality of rights of all persons. Since its founding in 1909, the NAACP has worked to eliminate racial hatred and racial discrimination. The NAACP is the nation's oldest civil rights organization.

The Lawyers' Committee and the NAACP submit this brief to express their views on the second and third questions on review. The second question is whether the Hobbs Act independently proscribes acts or threats of

---

[1] This brief was authored by counsel for the *amici curiae*. No person or entity other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

[2] Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3

physical violence in furtherance of a plan to obstruct, delay, or affect interstate commerce, and the third question is whether injunctive relief is available to private litigants under the remedial provisions of RICO.

For several decades, the Lawyers' Committee and the NAACP have served to secure and protect the civil rights of all citizens, particularly racial minorities, who have historically been denied those rights. Those rights, in large measure, have been obtained by groups and individuals engaging in peaceful protests, demonstrations, sit-ins, boycotts, and other forms of constitutionally protected non-violent advocacy and expression. *Amici* have sought to protect this process of peaceful change under law which, at times, has been jeopardized by organized violence and threats of violence. In a significant case before the Court, the Lawyers' Committee represented the NAACP in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), in which the Court upheld the constitutionality of non-violent activities of African Americans boycotting local white businesses in protest to policies of racial discrimination. Accordingly, the Lawyers' Committee and the NAACP are well aware of the importance of protecting expressive rights as a means of societal change, an issue obviously confronting the Court in this case.

With respect to the second question, the interests of the Lawyers' Committee and the NAACP are narrowly focused upon the proper application of First Amendment principles to the construction of the Hobbs Act so as to maintain a balance between protecting the freedoms of expression central for the advancement of the civil rights of citizens while prohibiting violent threats and conduct that prevent citizens from exercising their rights. The Lawyers' Committee and the NAACP have and take no position in the highly charged debate over abortion rights out of which the

facts in this case arise. The Lawyers' Committee and the NAACP embrace the right of all groups to express their views and to attempt to persuade others to adopt those views. Freedom of expression of all points of view through *peaceful* protest activities should not be stifled by civil or criminal liability or injunctive relief under RICO, the Hobbs Act, or other state and federal laws.

At the same time, the Lawyers' Committee and the NAACP believe that civil rights and free expression are enhanced, rather than chilled, by the imposition of liability against those who would use acts and threats of physical violence, rather than legitimate means of persuasion, to prevent others from engaging in lawful and protected conduct. In keeping with these principles, the Lawyers' Committee and the NAACP believe that the Court need not and should not opt for a narrower reading of the Hobbs Act out of concern for chilling or burdening protesters' freedom of expression. Interpreting the Hobbs Act as independently proscribing acts or threats of violence that obstruct, delay, or affect interstate commerce would not burden or chill protected forms of expression.

The Lawyers' Committee and the NAACP also are concerned with protecting the rights of citizens who are subjected to pervasive criminal conduct and believe that the remedial provisions of RICO are an important tool for private litigants. Therefore, with respect to the third question, the Lawyers' Committee and the NAACP support the congressionally intended right of plaintiffs in civil suits under RICO to avail themselves of a full range of remedies, including equitable and injunctive relief, in order to protect their own rights and to serve the public's interest in curtailing ongoing criminal enterprises. The Lawyers' Committee and the NAACP therefore urge the Court to

confirm that RICO authorizes private litigants to obtain injunctive relief.

SUMMARY OF ARGUMENT

The plain language of subsection (a) of the Hobbs Act clearly proscribes acts or threats of physical violence that obstruct, delay, or affect interstate commerce, whether or not the acts or threats are connected to robbery or extortion. Any other reading of the statute would render the final "physical violence" clause of subsection (a) superfluous. The narrower reading of the Hobbs Act urged by Petitioners is contrary to the statutory text and unnecessary to protect legitimate social protests. There simply is no First Amendment right to engage in acts and threats of physical violence.[3]

The First Amendment clearly demands tolerance of speech that is hostile, offensive, or even coercive. The First Amendment, however, has never been extended to protect those who resort to violence rather than legitimate means of persuasion to express their opinions. Thus "true threats" of physical violence and "fighting words" creating a clear and immediate danger of violent injury lack constitutional protection. Congress has carefully crafted the Hobbs Act to proscribe this unprotected conduct and enforcement of the plain language of subsection (a) is unlikely to burden or chill legitimate forms of expression.

Petitioners claim that, because of the broad-based nature of enterprise liability under RICO, a construction of the Hobbs Act as proscribing violent threats and conduct

---

[3] As noted in the Introduction, the Lawyers' Committee is expressing its views only on Questions 2 and 3 before the Court, relating to the scope of the Hobbs Act and the availability of injunctive relief for private litigants under RICO.

could cause individuals to be punished for engaging in protected conduct. These concerns are unwarranted. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982), requires "precision of regulation" to ensure that those engaged in social protest will not face civil or criminal liability, under RICO, the Hobbs Act, or other state or federal laws for the consequences of constitutionally protected forms of expression. The protections articulated in *Claiborne Hardware*, which were rigorously applied in this case, ensure that liability is imposed only for damages proximately caused by *unprotected* conduct and that no protester is punished merely for exercising the constitutional right to associate with others of like opinion.

As to the third question, the plain language of RICO does not contain a clear Congressional command stripping the federal courts of their traditional equitable powers to grant injunctive relief. Such a pronouncement would be required to deprive the courts of the power to grant injunctive relief. In expressly authorizing the Attorney General to seek preliminary injunctive relief, Congress has certainly not removed the power of the courts to grant a permanent injunction. Likewise, the grant to the Attorney General of standing to temporarily restrain a statutory violation does not limit the standing of those directly victimized to seek equitable protection. Public policy also favors allowing private plaintiffs to obtain injunctions because that interpretation of RICO will lead to more rigorous enforcement of the statute and the protection of public and private interests against ongoing criminal enterprises.

ARGUMENT

I. FIRST AMENDMENT PRINCIPLES DO NOT FAVOR A NARROWER CONSTRUCTION OF THE HOBBS ACT.

The second issue before the Court pertains to the scope of liability under subsection (a) of the Hobbs Act, which provides, in relevant part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). Respondents advocate a "three-way" interpretation of subsection (a), under which the statute should be read as forbidding not only robbery and extortion, and attempts and conspiracies to commit those crimes, but also "threatening or committing physical violence in furtherance of a plan to 'obstruct, delay, or affect commerce.'" *Nat'l Org. for Women, Inc. v. Scheidler*, 396 F.3d 807, 812 (7th Cir. 2005) (citation and internal quotation marks omitted). Petitioners, by contrast, argue that the statute forbids acts and threats of physical violence only when committed in furtherance of a plan to obstruct, delay, or affect commerce by robbery or extortion (the "two-way" interpretation). *See id.*

As acknowledged by the court of appeals, the three way interpretation of the statute best comports with a plain reading of the statute's text and principles of statutory construction. *See id.* at 815-16. The Hobbs Act defines "robbery," in part, as "the unlawful taking or obtaining of personal property from the person . . . against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1). "Extortion," means, in part, "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(1). As the court of appeals observed: "Anyone who commits physical violence to a person or property in furtherance of a plan of robbery or extortion would almost certainly be found to have attempted one of those crimes, or, if others are involved, to have conspired to commit one or the other." *Scheidler*, 396 F.3d at 816. Thus, it is difficult to conceive of situations in which the final "physical violence" clause of subsection (a) would criminalize conduct not already proscribed under the earlier "robbery and extortion" clause in that subsection. As a result, Petitioners' unduly restrictive interpretation is contrary to the "well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless." *Id.*; *see also* Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 S. Ct. Rev. 129, 143 (1994) (the two-way interpretation renders the physical violence clause "nugatory").

Petitioners argue that the Court should favor the narrower two-way interpretation of the statute, lest potential Hobbs Act liability place at risk "a wide variety of political and labor protesters." Brief for Petitioners Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and the Pro-Life Action League, Inc. ("Scheidler Br."), Sept. 2, 2005, at 31.

Such "free speech" concerns are unfounded. Imposing liability for acts and threats of physical violence is particularly unlikely to burden or chill free speech. Undoubtedly, the Court's First Amendment jurisprudence affords protection to a broad array of peaceful protest activities, but it simply does not extend to protect violent conduct and threats and certainly does not shelter the sort of pervasive violent conduct reflected in the record in this case. And because the Court's precedent already requires "precision of regulation" of acts and threats of violence, protesters need not fear that they will be subject to liability for engaging in protected activity.

A. A Proscription Against Acts And Threats Of Violence Reaches Only Speech And Conduct Outside The Scope Of The First Amendment.

Freedom of speech under the First Amendment to the United States Constitution is one of the basic tenets upon which our nation was founded and represents the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In the words of the Court, "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *Claiborne Hardware Co.*, 458 U.S. at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Among the public issues subject to this robust debate, none is more important than the debate over the contours of our civil rights, including reproductive rights.

The government may not restrict freedom of expression simply because the ideas expressed are considered offensive. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the

First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *see also Sullivan*, 376 U.S. at 271 (constitutional protections do not turn on "the truth, popularity, or social utility of the ideas and beliefs which are offered") (internal quotation marks omitted). The First Amendment demands tolerance of a certain amount of "verbal tumult, discord, and even offensive utterance," as these are "necessary side effects of the broader enduring values which the process of open debate permits us to achieve." *Cohen v. California*, 403 U.S. 15, 24-25 (1971) (overturning breach of peace conviction of anti-war protester who walked through courthouse wearing t-shirt with offensive anti-draft language). The Court has protected even speech and conduct meant to coerce "through social pressure and the 'threat' of social ostracism," and has recognized that speech on highly-charged issues often may become "vituperative, abusive, and inexact." *Claiborne Hardware*, 458 U.S. at 909, 910 n.46; *see also Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("The claim that the expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment"). However, the Court has never protected the sort of violent activity in which Petitioners engaged. *See, e.g., Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 704 (7th Cir. 2001).

It is also a fundamental precept that free speech rights guaranteed under the Constitution may be exercised most efficaciously when individuals of like opinions band together. Thus, in *Claiborne Hardware*, the Court stated:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more

> than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

458 U.S. at 908 (internal quotation marks and citation omitted). The Court has protected a broad range of activities associated with social protest, including picketing and peaceful marches and demonstrations. *See id.* at 909. Although the ideas they express may be controversial, protesters will have a defense to criminal or civil liability if they adhere to peaceful, lawful means. *See Cox v. Louisiana*, 379 U.S. 536 (1965) (breach of peace convictions reversed when civil rights demonstrations were orderly, peaceful and consisted of protected forms of expression including picketing, handing out leaflets, displaying signs, and singing songs).

"The protections afforded by the First Amendment, however, are not absolute." *Virginia v. Black*, 538 U.S. 343, 358 (2003). This Court has "long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Id.*; *see also Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) ("To be sure, our cases reject the 'view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea'") (citation omitted).

As this Court stated in *Claiborne Hardware*, "'[c]ertainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" 458 U.S. at 916 (citing *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglass, J., concurring)); *see also Mitchell*, 508 U.S. at 484 ("a physical assault is not by any stretch of the imagination expressive conduct

protected by the First Amendment"); *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection").

Likewise, the First Amendment does not shelter "true threats." *Black*, 538 U.S at 358-60. "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359; *see also Hill v. Colorado*, 530 U.S. 703, 716 (2000) (a "deliberate 'verbal or visual assault'" may justify proscription of such offensive speech) (citation omitted). "The speaker need not actually intend to carry out the threat." *Black*, 539 U.S. at 359-60. "Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 360 (citations and internal quotation marks omitted).

Threats of violence are akin to "fighting words" and are not entitled to First Amendment protection. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic"). "[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of *expressing* whatever idea the speaker wishes to convey." *R.A.V. v. City of St. Paul, Minn.* 505 U.S. 377, 393 (1992); *see also Giboney v. Empire Storage &*

Ice Co., 336 U.S. 490, 502 (1949) (First Amendment does not protect language used to carry out illegal conduct).

An interpretation of the Hobbs Act that independently proscribes acts and threats of violence corresponds closely with categories of conduct and speech which this Court has held are unequivocally excluded from the First Amendment's protections. As a result, the three-way interpretation of the Hobbs Act Respondents advocate is particularly unlikely to sweep within the statute's prohibitions protected free speech or conduct. Petitioners' alleged concerns that protesters' free speech rights will be inhibited are therefore misplaced. Certain "gray areas" still may exist in the Court's First Amendment jurisprudence. *See, e.g., Stewart v. McCoy*, 537 U.S. 993, 995 (2002) (Stevens, J.) (statement respecting denial of *certiorari*) (the Court has "not yet considered" whether the First Amendment protects "instructional speech" (as opposed to mere advocacy) with respect to the "[l]ong range planning of criminal enterprises-which may include oral advice, training exercises, and perhaps the preparation of written materials"). But the issue of whether threats or acts of actual physical violence are protected is not a gray area. The First Amendment simply does not reach so far.

To narrowly construe the Hobbs Act and to avoid proscribing acts and threats of physical violence in the name of free speech would, in effect, turn the Court's First Amendment jurisprudence on its head. The Court, therefore, should decline Petitioners' invitation to construe the Hobbs Act narrowly out of concern for chilling protesters' freedom of expression.

B. The Court's Jurisprudence Ensures That A Proscription Against Acts And Threats Of Violence May Not Be Used To Punish Protected Conduct.

Petitioners claim that the risk to social protesters is heightened because of the broad-based nature of enterprise liability under RICO. *See* Scheidler Br. at 31. These concerns are misplaced.

It is true that individuals or groups engaged in constitutionally protected forms of social protest occasionally may cross the line between protected expression and unprotected, unlawful conduct. This Court's precedent, however, already ensures that First Amendment protections are not automatically forfeited as a result by demanding "precision of regulation" of violence or threats of violence occurring in the context of constitutionally protected activity. *Claiborne Hardware*, 458 U.S. at 916 (citation omitted). Specifically, the First Amendment "imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *Id.* at 916-17; *see also Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 263 (1994) (Souter J., concurring) (RICO defendants may raise First Amendment defense in particular cases).

The First Amendment allows liability to be imposed only for damages "proximately caused by unlawful conduct." *Claiborne Hardware*, 458 U.S. at 918. Courts strictly guard against imposing liability for the consequences of nonviolent, protected activity, while protecting society from violence or threats of violence. To punish association with a group, a plaintiff must establish the defendant's "'knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further

those illegal aims.'" *Id.* at 920 (quoting *Healy v. James*, 408 U.S. 169, 186 (1972)).

Under these strict criteria, the collective activities of a group may not give rise to liability unless violence "colored the entire collective effort." *Id.* at 933. The burden to make such a showing is high:

> Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity.

Id. at 933-34. Under *Claiborne Hardware*, sit-ins, boycotts and the other non-violent collective activities would not provide a basis for liability.

The strict criteria articulated in *Claiborne Hardware* can and should be applied rigorously, and they were in this case. Thus, the jury was instructed that: "to find the defendants liable, you must conclude that the enterprise, or those acting on behalf of the enterprise, directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives." *Scheidler*, 267 F.3d at 704. The record in this case was replete with evidence of violent threats and conduct. *See id.* at 694; Respondents' Brief in Opposition to Petitions for Writ of Certiorari, May 10, 2005, at 3-6. The evidence showed, and the jury found that Petitioners, consistent with the principles of *Claiborne Hardware*, were responsible for four acts and threats of violence. *See*

Scheidler, 267 F.3d at 695, 703. It would be fully consistent with First Amendment principles for the district court to be allowed to consider whether the four acts and threats of violence constitute a pattern of racketeering activity and warrant imposition of an appropriately tailored injunction.

II. THE COURT OF APPEALS' PRIOR HOLDING THAT RICO PROVIDES EQUITABLE REMEDIES FOR PRIVATE PLAINTIFFS IS CORRECT.

A. The Text Of The RICO Statute Plainly Authorizes Equitable Relief For Private Parties.

In the prior direct appeal, the court of appeals was asked to decide whether Congress in enacting RICO withheld from the federal courts their customary power to provide equitable relief. The court of appeals' conclusion that the statute's plain text authorizes private plaintiffs to obtain injunctive relief is sound and supported by public policy. The court of appeals' conclusion has been adopted in recent district court decisions. *See Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 243-44 (S.D.N.Y. 2002), *remanded*, 322 F.3d 130 (2d Cir. 2003) (per curiam) (directing dismissal of RICO claims as unripe); *In re Managed Care Litig.*, 298 F. Supp. 2d 1259, 1281-83 (S.D. Fla. 2003).

As the Seventh Circuit correctly stated, interpretation of the remedial provisions of the RICO statute "begins with the statute's text, and, if the text is unambiguous, . . . ends there as well." *Scheidler*, 267 F.3d at 695 (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001)). Assuming *arguendo* that the text is less clear than the court of appeals believed, Petitioners cannot prevail unless Congress clearly excluded equitable relief. *See Califano v. Yamasaki*, 442 U.S. 682,

705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction"); *accord Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied"); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11-17 (1942) ("Congress would not, without clearly expressing such a purpose, deprive . . . [a court] of its customary power. . . . [D]enial of such power is not to be inferred . . . [from] silence. . . . Where Congress wished to deprive the courts of . . . historic power, it knew how to use apt words"). Absent a Congressional command to the contrary, the availability of all legal and equitable remedies should be presumed: "[I]t is . . . well settled that where legal rights have been invaded, and a federal statue provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946).

A narrow reading of RICO, moreover, is also contrary Congress' command that: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Thus, "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition . . . ." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985); *see also United States v. Turkette*, 452 U.S. 576, 587 (1981) (taking liberal construction clause into account in holding that the term "enterprise" should be construed broadly to include both legitimate and illegitimate enterprises).

Close examination of the text of RICO's civil remedies provision, 18 U.S.C. § 1964, yields no evidence that Congress intended to withdraw equitable jurisdiction.

> Section 1964 provides, in pertinent part, that:
>
> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders . . . .
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions . . . as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

Subsection (a) broadly empowers the federal courts to grant injunctive relief in actions brought under the RICO statute. This broad authority is not limited by the subsection's text or by legislative history to a governmental claim for relief. *See, e.g.*, H.R. REP. No. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034 ("Although certain remedies are set out, the list is not meant to be exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting

influence and make due provision for the rights of innocent persons").

Subsection (b) authorizes the Attorney General to institute proceedings "under this section" (*i.e.*, under § 1964), and specifically empowers the government to seek interim injunctive relief. Petitioner, and the United States, in its brief as *amicus curiae*, suggest that by granting the government authority under subsection (b) to bring actions "under this section," "Congress signaled its intent that the district court's equitable jurisdiction under Section 1964(a) must be invoked by the Attorney General." Brief for the United States as Amicus Curiae ("U.S. Br."), Sept. 2, 2005, at 20. This argument is untenable for at least three reasons.

First, this argument ignores private plaintiffs' right to sue under Section 1964. Subsection (c) authorizes suits by private parties and provides for recovery by a successful plaintiff of treble damages, costs, and attorney's fees and nowhere limits the availability of equitable relief.

The language of subsection (c) does not bar private plaintiffs from access to the equitable powers accorded the federal courts in subsection (a), either expressly or by a "necessary and inescapable inference." *Porter*, 328 U.S. at 398. Had Congress intended to preclude such relief to private plaintiffs, it easily could have done so. For instance, instead of providing in subsection (c) that any person injured "may sue . . . *and* shall recover threefold the damages . . . ," Congress could have provided that a plaintiff "may sue . . . *to* recover threefold the damages . . . ." *See* 18 U.S.C. § 1964(c). By changing a single word, Congress would have made clear that private plaintiffs were limited to damages, costs and fees. To the contrary, the actual language establishes that those remedies are accorded to private

plaintiffs *in addition to* the general equitable relief provided for in subsection (a).

Second, this argument overlooks the real purpose of the language in subsection (b) empowering the government to file suit "under this section." As the Seventh Circuit held in *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), the inclusion of specific authorization for government equity suits in section 1964 was intended to eliminate dispute about the scope of the Attorney General's authority to seek equitable relief. Under traditional rules of equity, the government's request for an injunction was subject to the requirement that it establish irreparable injury or inadequacy of remedy at law. Section 1964 removed these requirements:

> It was plainly the intention of Congress in adopting Section 1964 to provide for injunctive relief against violations of Section 1962 without any requirement of a showing of irreparable injury other than that injury to the public which Congress found to be inherent in the conduct made unlawful by Section 1962. It is also obvious that Congress did not intend to require a showing of inadequacy of the remedy at law.

Id. at 1358-59.

Third, Petitioners' construction creates absurd results. If authorization for injunctive relief is limited by express allowance in subsection (b) of the Attorney General to seek *preliminary* injunctive relief, then no one, not even the Attorney General, would be authorized to seek *permanent* injunctive relief which the Congress contemplated in subsection (a). Finally, as a practical matter, it defies logic that Congress would authorize private parties to recover

treble damages and costs and fees incurred because of the injury but deny them the ability to prevent the harm from occurring.

B. Public Policy Considerations Favor Allowing Private Parties To Seek Equitable Relief.

Public policy considerations support interpreting RICO to allow private parties to seek and obtain equitable relief. The United States argues in its *amicus* brief that policy considerations counsel against allowing private plaintiffs to request the "wide ranging" remedies available under RICO because such remedies should rest only in the hands of a "public authority sanctioned by the sense of public responsibility." U.S. Br. at 28; *see also* Brief for Petitioner Operation Rescue, Sept. 2, 2005, at 38 (arguing that because "private parties do not have the political accountability, or the duty to exercise prosecutorial discretion," requests for injunctive relief could be "misused"). This argument is misplaced and ignores the fact that the court is vested with the ultimate decision about whether to issue equitable relief.

Congress, in enacting the civil liability provisions of RICO, reposed its trust in private litigants, envisioning them as "private attorney generals" who would supplement the enforcement of the statute. In *Rotella v. Wood*, 528 U.S. 549, 557-58 (2000), the Court stated that "[t]he object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." (Citations omitted). As this Court has recognized, private attorney general actions perform an important function in a world of limited resources. "Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps."

Sedima, 473 U.S. at 493; *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (RICO "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in . . . RICO is the carrot of treble damages"). *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (private attorney general statutes "provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations").

Private litigants cannot fulfill their role as "private attorneys general" unless they are able to avail themselves of the full range of equitable remedies traditionally available in the federal courts. To establish a "pattern" of racketeering, an element of a RICO claim, "a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal conduct." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Plaintiffs in civil lawsuits will not be able, in all instances, to protect themselves, and the public, from ongoing racketeering activity if they cannot obtain injunctive relief or other equitable remedies.

Even the Court in *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986), recognized the public policy benefits of allowing private parties to obtain equitable relief:

> [W]e recognize the force of the [plaintiff's] argument that a private injunctive remedy would permit an injured party to put an immediate stop to racketeering behavior that threatens his or her business with economic destruction before the business has been

> brought to its knees. While the treble damages remedy is a potent weapon, it necessarily assumes that economic injury has occurred. The preventive effect of injunctive relief is often a more just remedy. Although civil RICO empowers the government to bring an injunctive suit to protect a threatened enterprise, we recognize that the resources of the Unites States Attorney's office are limited. . . . 'Private attorney general provisions . . . are in part designed to fill prosecutorial gaps,' and the use of equitable remedies by private parties would frequently result in substantial benefits to society generally. These broad social benefits, such as the dismantling of an illegitimate enterprise, would generally exceed the gain to the private plaintiff from this action, especially where the individual's injury has been ameliorated by treble damages.

(Citations omitted). Thus, public policy considerations weigh in favor of allowing private parties to seek equitable relief under RICO.

The court of appeals' holding on direct appeal that the plain language of RICO's remedial provisions permits private injunctive relief is correct and is consistent with important public policy concerns.

CONCLUSION

For the foregoing reasons, the Lawyers' Committee and the NAACP respectfully submit that (1) consistent with First Amendment principles, the Hobbs Acts prohibits acts or threats of physical violence that obstruct, delay, or affect interstate commerce, and (2) the Seventh Circuit correctly concluded that RICO authorizes injunctive relief to private plaintiffs.

Respectfully submitted,

JOHN C. BRITTAIN
MICHAEL L. FOREMAN
SARAH C. CRAWFORD
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue
Suite 400
Washington, D.C. 20005
202-662-8600

JOSEPH R. BANKOFF*
EMILY J. CULPEPPER
DAVID M. VISCOMI
CHAD A. PETERSON
LAUREN M. KOHN
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, D.C. 20006-4706
202-737-0500

DENNIS COURTLAND HAYES
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
4805 Mt. Hope Drive
Baltimore, MD 21215
410-580-5797

**Counsel of Record*

Counsel for *Amici Curiae*

October 21, 2005

Supreme Court, U.S.
FILED
SEP 26 2005
OFFICE OF THE CLERK

(17) (16)

No. 04-1244 and 04-1352

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH SCHEIDLER, et al, *Petitioners*

v.

NATIONAL ORGANIZATION FOR WOMEN, *Respondent*

OPERATION RESCUE, *Petitioner*

v.

NATIONAL ORGANIZATION FOR WOMEN, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF BY LEGAL DEFENSE FOR UNBORN CHILDREN IN SUPPORT OF NEITHER PARTY

ALAN EDWARD ERNEST
COUNSEL

P.O. BOX 4041
RIO RICO, AZ 85648
(520) 281-7513

TABLE OF CONTENTS

Interest of *Amicus Curiae*.....1
Summary of Argument.....1
Argument

I. THE U.S. CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN..1

A. On its face, the Constitution's guarantee of life to "any person" does include the unborn.....1

B. The spirit of the law proves that the Constitution's guarantee of life to "any person" does include the unborn 3

C. History confirms that the Constitution's guarantee of life to "any person" does include the unborn.....4

II. *ROE* v. *WADE* IS VOID BECAUSE IT CRIMINALLY DEFIED THE U.S. CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON," AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE.....7

A. *Roe* v. *Wade* criminally defied the Constitution's guarantee of life to "any person" because the Court decreed killings to be "liberty" which the people had defined to be "murder." In effect, the Court decreed MASS MURDER IS LIBERTY.....7

1. The Court decreed killings to be "liberty" which Americans had defined to be "murder" since earliest colonial times 9

Table of Contents - *Continued*

2. The Court decreed killings to be "liberty" which the framers and adopters of the Fourteenth Amendment defined to be "murder."....10

3. The U.S. Supreme Court and the U.S. Government claim power to decree the mass murder of Jews, or anyone else, to be liberty....11

4. The U.S. Supreme Court has committed treason to the U.S. Constitution....13

5. The United States being ruled by a giant conspiracy to mass murder is the most catastrophic crime in the history of civilization....15

B. *Roe* v. *Wade* criminally defied the Constitution's guarantee of life to "any person" because the Court defied the rulings of Chief Justice John Marshall and used a "Guilty Until Proven Innocent" burden of proof to imply that the words "any person" did not include the unborn....15

C. *Roe* v. *Wade* criminally defied the Constitution's guarantee of life to "any person" because the Court used criminal procedures to conclude that the words "any person" do not include the unborn....18

D. *Roe* v. *Wade* criminally defied the Constitution's guarantee of life to "any person" because the Court fabricated false evidence to imply that the words "any person" do not include the unborn....18

Table of Contents - Continued

E. Due process of law has compelled the U.S. Supreme Court to confess in court that it is guilty of extermination and murder.....26

III. IF *ROE* v. *WADE* IS A MISTAKE OF LAW, THEN ALL PUBLIC OFFICIALS, OR CITIZENS, WHO SUPPORT IT MAY BE GUILTY OF COMPLICITY IN EXTERMINATION, INCLUDING MASS MURDER.....28

Conclusion.....30

Table of Authorities

Cases:

Baxter v. *Palmigiano*, 425 U.S. 308 (1976).....26

Bennett v. *State*, 377 P 2d 634 (1963).....11

Clarke v. *State*, 117 Ala. 1 (1898).....10, 11

Cohens v. *Virginia*, 6 Wheat. 264 (1821).....14

Dartmouth College v. *Woodward*, 4 Wheat. 518 (1819)...16

Dred Scott v. *Sanford*, 19 How. 393 (1857).....4, 5, 6

Ernest v. *U.S. Attorney for the Eastern District of Virginia, U.S. Attorney General*, cert. denied 475 U.S. 1085 (1986).....12, 13

Ernest v. *Rehnquist, Stevens, Breyer O'Connor, Scalia, Souter, Thomas, Ginsburg, etc., U.S. Attorney, etc., U.S. Attorney General*, in the U.S. District Court in Alexandria, Civil No. 89-732A.....13

Federal Constitutional Court of West Germany, 1 BVerfG 39, reported in R. Destro, *Abortion and the Constitution: The Need for a Life Protective Amendment*, 63 Cal. L. Rev. 1250 (1975).....3, 25

Gulf, Colo. and S. Fe RR v. *Ellis*, 165 U.S. 150 (1896).....3-4

Hamilton v. *United States*, 26 App D.C. 382 (1905).....10

Lamb v. *State*, 67 Md. 524 (1887).....19

Table of Authorities - *Continued*

Marbury v. *Madison*, 1 Cranch 137 (1803).....13, 27

Mills v. *Comm.*, 13 Pa. 631 (1850).....19, 25

Ogden v. *Saunders*, 12 Wheat. 213 (1827).....13

People v. *Chavez*, 77 Cal. App 2d 621 (1947) 8, 11

Pollard v. *Dwight*, 4 Cranch 421(1807).....11

Porter v. *Lasiter*, 87 SE 2d 100 (1955).....11

Regina v. *West*, 2 C & K 784 (1848).....9

Ross v. Oregon, 227 U.S. 150 (1912).....28

Santa Clara v. *So. Pac. RR*, 118 U.S. 394 (1886).....16

Singleton v. *State*, 35 So 2d 375 (1948).....11

Smith v. *State*, 33 Me. 48 (1851).....22

State v. *Anderson*, 343 A. 2d 505 (1975).....11

State v. *Reed*, 45 Ark. 333 (1885).....19

State v. *Slagle*, 83 N.C. 544 (1880).....19

Sturges v. *Crowninshield*, 4 Wheat. 122 (1819).....16

United States v. *Altstoetter* [The Justice Case],
3 Trials of War Criminals Before the
Nuernberg Military Tribunals (1951).....14

United States v. *Hale*, 422 U.S. 171(1975).....27

Table of Authorities - *Continued*

Watson v. *State*, 117 A 2d 549 (1955).....11

Yick Wo v. *Hopkins*, 118 U.S. 356(1986) 16

Texts

J. Archbold, *Complete Treatise on Criminal Procedure, Pleading and Evidence* (7th ed. 1860).....9

J. Bishop, *Commentaries on the Criminal Law* (4th ed. 1868).....10-11

Black's Law Dictionary (Rev. 4th ed. 1968).....17

Blackstone, *Commentaries* 9, 29

L. Burdick, 2 *The Law of Crime* (1946).....11

Winston Churchill, *The Gathering Storm* 262 (1948).....29

Coke, *Institutes* 9, 11

T. Denman, M.D., *Introduction to the Practice of Midwifery* (1802).....20, 21

Alan Ernest, *Mass Murder Is Liberty: How The United States Is Ruled By the Decree MASS MURDER IS LIBERTY* (1998).....29

The Federalist, No. 10 (James Madison).....1

Hawkins, *Pleas of the Crown*.....9

H. Hodge, M.D., *The Principles and Practice of Obstetrics* (1864).....24, 25

Table of Authorities - *Continued*

O.W. Holmes, *The Common Law* (Howe ed.1963).....28

T. Jefferson, *The Writings of Thomas Jefferson* (Berg ed. 1907).....9

A. Lincoln, *Collected Works of Abraham Lincoln* (R. Basler ed. 1953).....2, 5

McCormick's Handbook of the Law of Evidence (Cleary ed. 1972).....26

G. Orwell, *1984* (1949).....29

R. Perkins, *Perkins on Criminal Law* (2d ed. 1969).....11, 28

Plato (Jowett translation, 1942).....26

F. Rambotham, M.D., *Principles and Practice of Obstetric Medicine* (4th ed. 1856).....21

W. O. Russell, 1 *Treatise on Crimes and Misdemeanors* (4th ed. 1865).....9

B. Schwartz, *Statutory History of the United States: Civil Rights* (1970).....6

H.R. Storer, M.D., *On Criminal Abortion in America* (1860).....22-23

A. S. Taylor, *Manual of Medical Jurisprudence* (Penrose Am. ed., 6th ed. 1854).....10, 11

A. Velpeau, M.D., *Complete Treatise on Midwifery* (4th Am. ed. 1854).....21

Table of Authorities - *Continued*

G. Washington, *The Writings of George Washington* (Fitzpatrick ed. 1940).....14

F. Wharton, *A Treatise on the Criminal Law of the United States* (5th ed. 1861).....22

F. Wharton, *Wharton's Criminal Law and Procedure* (12th ed. 1957).....11

F. Wharton, *Treatise on the Law of Homicide in the United States* (1855).....11

Wigmore, *Evidence* (Chadborn Rev. 1972).....26

Motions and Briefs Filed in this Court:

Brief on behalf of the State of Georgia, *Doe* v. *Bolton*, 410 U.S. 179 (1973).....7

Brief on behalf of the State of Texas, *Roe* v. *Wade*, 410 U.S. 113 (1973) 4

Motion to Allow Counsel to Represent Children Unborn and Born Alive, filed in this case.....18

Articles and Reports

Hearings on Constitutional Amendments on Abortion, before subcomm. On Civil and Constitutional Rights, of the House Comm. of the Judiciary, 94th Cong., 2d Session, Ser. 46, Part 1 at 397 (1976).....7-8

L.S. Joynes, M.D., *Foetus in Utero*, Virginia Med. J. (1856).....23, 24

Model Penal Code (Proposed Official Draft 1962)..... 28

Table of Authorities - *Continued*

R. Penrose M.D., *Discourse on the Life of H.L. Hodge* (1872).....25

E. Quay, *Justifiable Abortion: Medical and Legal Foundations*, 49 Geo. L.J. 395 (1961).....19

Transactions of the American Medical Association (1860).....24

U.S. Constitution:

Fifth Amendment

Guarantee of life to "any person".....1-7

Burdens of proof 15-18

Silence as confession 26-29

Fifth and Sixth Amendment:

Assistance of counsel.....18

Prior notice 18

Secret proceedings 18

Confrontation 18

Presenting evidence 18

Fourteenth Amendment

Guarantee of life to "any person" 1-7

INTEREST OF THE AMICUS CURIAE

The *amicus* defends the constitutional right to life of unborn children which the parties have not done.

SUMMARY OF ARGUMENT

The U.S. Constitution's guarantee of life to "any person," made in its 5th and 14th Amendments, does include the unborn.

ARGUMENT

I.

THE U.S. CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN.

The Declaration of Independence announced that reverence for life is America's founding principle. It said that all men are created equal, all are endowed by their Creator with an unalienable right to life, and the purpose of government is to protect the life of everyone.

America told the world that if we will follow our reverence for life wherever it may lead, then a future of more abundant life, which we can look forward to with hope, will unfold before us. On the other hand, Madison warned that the primitive idea, that some can gain by harming others, had ruined all democracies known to history.[1] And the lethal inventions of science have made reverence for life the only way to the future.

A. On its Face, the U.S. Constitution's Guarantee of Life to "Any Person" Does Include the Unborn

This guarantee of life to everyone was incorporated into the U.S. Constitution. The 14th Amendment's guarantee of life reads: "(N)or shall any State deprive ***any person*** of

---

[1] *The Federalist*, No. 10 (James Madison).

Rule 37.6 disclosure: Counsel authored the whole *amicus* brief; no monetary contributors are required to be identified.

life...without due process of law." (emphasis added).

The words "any person" are universal, admit of no exceptions for anyone, make no distinction between born and unborn life, and on their face include the unborn, the same as everyone else. The obvious purpose of guaranteeing life universally to "any person" was to prohibit government officials making exceptions so some persons could be exterminated.

The Court admitted that if the word "person" included the unborn, then *Roe* v. *Wade* "collapses," because the lives of the unborn would be "guaranteed" by the Constitution.[2] But the Court implied that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[3] Thus the Court hit the Constitution head-on, directly defied its express prohibition of extermination, and condemned to death those victims whom the Constitution, by its plain words, endeavors to preserve.

The words "any person" are the two most important words ever written into law because they protect the lives of everybody from extermination, and they summarize America's unique contribution to civilization. As Lincoln said, what made America great was the promise "that ***all*** should have an equal chance."[4] (emphasis in text).

The words "any person" are the words which guarantee that equal chance to live to ***all***, they stand as the supreme political achievement of the human race, the prize of millenniums of struggle. If the Constitution had stated it protected the life of "any person - except the unborn," then its words would support *Roe* v. *Wade*. But its words say "any person," without any exceptions.

The Court ruled that the words "any person" included

---

[2] *Roe* v. *Wade*, 410 U.S. 113, 156-157 (1973).

[3] *Id.*, at 158.

[4] 4 *Collected Works of Abraham Lincoln* 240 (R. Basler ed. 1953).

Chinese aliens, merely saying the words are "universal in their application, to all persons...without regard to any differences." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886).

In 1975, the Supreme Court of West Germany held that the words in its Constitution, "Everybody has the right to life," did include the unborn. It explained that the word "everybody" is universal.

But in *Roe* v. *Wade*, the Court ignored the letter of the law. Instead the Court focused on the isolated word "person," and ignored its modifier "any." Yet "any" is the word which means "all," and extends the right to life to everyone without any exceptions.

By reading the universal guarantee of life to "any person" as if it were merely a guarantee to "some persons," the Court did the most forbidden thing, and reduced the most important law in history to nothing.

The Constitution extends its guarantee of life to "any person." The letter of the law permits no exceptions. On their face the universal words "any person" do include the unborn.

B. The Spirit of the Law Proves that the U.S. Constitution's Guarantee of Life to "Any Person" Does Include the Unborn

Roe v. *Wade* violates the spirit of the law, as well as its letter. The Court itself ruled that the Declaration of Independence is the spirit of the Constitution:

> The first official action of this nation declared the foundation of government in these words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life..." While such declaration of principles may not have the force of organic law...yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of

> the Declaration of Independence. No duty rests more imperatively upon the courts than...to secure the equality of rights which is the foundation of free government.
> *Gulf, Colo. & S. Ry* v. *Ellis*, 165 U.S. at 159-160 (1896).

There is no real medical dispute that the unborn have been created and are alive.[5] So reading the letter of the Constitution, the universal guarantee of life to "any person," in the spirit that ***all*** are "created equal," and ***all*** shall get their chance to live, permits only one conclusion - that the words "any person" do include the unborn.

C. History Confirms that the Constitution's Guarantee of Life to "Any Person" Does Include the Unborn

In addition to the letter and spirit of the law, the universal embrace of this guarantee of life to "any person" is also evident from its history. The last time the Court implied an exception to the words "any person" was *Dred Scott* v. *Sandford*, 19 How. 393 (1857). There the Court ruled that: the word "person," as used in the Fifth Amendment, did not include Negroes because they were not persons in the whole sense; the phrase in the Declaration of Independence, "all men are created equal," did not include Negroes; there was a constitutional right to own a slave ("the right of property in a slave is distinctly and expressly affirmed in the Constitution"); Congress could not prohibit slavery in the territories; people were free to choose whether or not to own slaves; and Negroes could not sue in federal courts to see if they were slave or free.

Abraham Lincoln opposed the *Dred Scott* decision. If officials can say all men are created equal except Negroes, he

---

[5] The medical evidence in the Texas brief in *Roe v. Wade* showed the fetal heart begins "pulsations at 24 days," and "brain waves have been noted at 43 days," and the unborn child is "alive."

asked, "where will it stop?"[6] If officials can say the Declaration does not include blacks, Lincoln argued that they can say it doesn't include any other person. He claimed *Dred Scott* was based on "falsehood."[7] He alleged a conspiracy by the U.S. Supreme Court, two U.S. Presidents, and leading members of Congress to overturn the U.S. Constitution and impose a slave empire on America.[8]

Lincoln said he would not obey *Dred Scott*. Citing both Thomas Jefferson and Andrew Jackson as authority,[9] he said the president swears an oath to obey the Constitution as he understands it, and not as it was understood by the Supreme Court. If the president were bound by *Dred Scott*, Lincoln explained in his First Inaugural Address, "the people will have ceased, to be their own rulers."[10]

Dred Scott triggered a civil war. Various States withdrew from the Union rather than be deprived of their constitutional right to own a slave, as decreed by the Court. President Lincoln defied the Court's *Dred Scott* decision, that there was a constitutional right to own a slave, because he emancipated the slaves and declared them to be "forever free."[11] He reminded us at Gettysburg that we were fighting to see whether a nation dedicated to the proposition that "all men are created equal" could long endure.

One of the framers of 14th Amendment explained that its purpose was to rededicate America to its original proposition: "It establishes equality before the law, and it gives to the humblest...the most despised...the same protection before the law as it gives to the most powerful....Without this...there is no republican government." Rep. Jacob Howard, quoted in

---

[6] 2 *Collected Works of Abraham Lincoln* 500 (R. Basler ed. 1953).
[7] *Id.*, 495.
[8] *Id.*, at 461-469, 521.
[9] *Id.*, at 402, 516-17.
[10] 4 *Collected Works of Abraham Lincoln* 268 (R. Balser ed. 1953).
[11] 6 *Collected Works of Abraham Lincoln* 28-30 (R. Balser ed. 1953).

B. Schwartz, 1 *Statutory History of the United States: Civil Rights* 262 (1970).

The framers of the Fourteenth Amendment learned from *Dred Scott*. They said the Supreme Court must never again imply exceptions to the words "any person." They employed the universal words most suited for this purpose.

And by the middle of the 19th century, medical science had discovered that an unborn child was alive throughout gestation, and there was no time during gestation when science could draw a line and say the unborn were not alive. By the time the Fourteenth Amendment was adopted in 1868, the vast majority of States had already enacted criminal abortion laws to protect all stages of unborn life, and within a few years such laws were universal.

The history of these criminal abortion laws shows that the framers and adopters of the Fourteenth Amendment intended its universal guarantee of life to "any person" to mean what it says, and to include the unborn the same as everyone else.

Yet *Roe* v. *Wade* is another *Dred Scott* disaster. The Court assumes that, without one word of explanation, the framers intended their guarantee of life to "any person" to sweep away all their abortion statutes and make the killings, which they said were criminal, into "liberty." The Court assumes that the framers connived to repudiate a major point of the Civil War, so judges would again be at liberty, as in *Dred Scott*, to convulse society by implying more exceptions to the words "any person." And the Court amends the Declaration of Independence to read "all men are created equal - except those created to be killed." The Court claims it can decree who was created to be killed.

The Court did the most forbidden thing: it directly defied the Constitution's express guarantee of life to "any person," and decreed criminal extermination to be legal.

The Fourteenth Amendment's letter, spirit, and history allow only one conclusion: the express and universal guarantee of life to "any person" does include the unborn.

II.

ROE v. *WADE* IS VOID BECAUSE IT CRIMINALLY DEFIED THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE.

A.

Roe v. Wade Criminally Defied the Constitution's Guarantee of Life to "Any Person" Because the Court Decreed Killings to Be "Liberty" Which the People Had Defined to Be "Murder." In Effect, the Court Decreed MASS MURDER IS LIBERTY.

When *Roe* v. *Wade* was decided in 1973, an abortion was murder if the child was "born alive." A child could be "born alive" during second or third trimester abortions. Indeed, the State of Georgia forewarned the Court that certain abortions were "murder."[12] But the Court scorned that warning and decreed those very killings to be "liberty."[13]

In 1976, a physician explained to Congress that *Roe* v. *Wade* permitted second trimester hysterotomy abortions, and children killed by this abortion procedure can be "born alive":

> "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were **born alive**."[14] (emphasis added)

The physician showed Congress this photograph of a child

---

[12] *Doe* v. *Bolton*, 410 U.S. 179 (1973), Brief for Appellees 52-53.

[13] *Roe* v. *Wade*, 410 U.S. 113, 153 (1973). The Court decreed a right to abortion to be "founded in the Fourteenth Amendment's concept of personal liberty."

[14] Hearings on Constitutional Amendments on Abortion, before subcomm. On Civil and Constitutional Rights, of the House Comm. Of the Judiciary, 94th Cong., 2d Session, Ser. 46, Part 1 at 397 (1976).

killed by a salt poisoning abortion. He said this method could also result in a child being "born still alive."

For almost four centuries, Americans had defined such killings to be "murder." But in 1973 the Court decreed such killings to be "liberty."

And by 1973, States had decided that in the third trimester a child need not be "born alive," but was a human being within their homicide or murder statutes if the child were killed "in the process of being born."[15] But the Court also decreed those murders to be "liberty."[16] Indeed under *Roe* v. *Wade* doctors kill children in the very process of being born.

---

[15] *People* v. *Chavez*, 77 Cal. App. 2d 621, 626 (1947).

[16] *Doe* v. *Bolton*, 410 U.S. 179 (1973). The Court decreed that abortions could be performed in the third trimester to protect the woman's "health," which the Court ruled included "all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well being of the patient."

1. The Court Decreed Killings to Be "Liberty" Which Americans Had Condemned as "Murder" Since Earliest Colonial Times.

America's first settlement at Jamestown followed the English common law, as did other colonies. The common law defined an abortion, in which a "quick" (about 4 months gestation) child died after being "born alive," to be "murder."[17] Even if not yet viable, if the child was "born alive," Coke (the standard 17th century legal authority) condemned the abortion as "so horrible an offense" and "this is murder."[18] Jefferson wrote that Coke's work was "the fundamental code of English law"[19] which makes it a foundation of American liberty.

The English writers cited this as the correct statement of the law.[20] And English courts followed this law.[21]

The English common law was the law of the land in colonial America. By allowing second and third trimester abortions, the Court decreed killings to be "liberty" which Americans had defined to be "murder" since earliest colonial times.

---

[17] Coke, 3 *Inst.* 50; Hawkins, 1 *Hawkins* Ch. 13, s. 16; Blackstone, 4 *Bl. Com.* 198.

[18] Coke, 3 *Institutes* 50.

[19] Jefferson wrote of Coke's *Institutes*: "This work is executed with so much learning and judgment, that I do not recollect that a single position in it has ever been judicially denied....It may still be considered as the fundamental code of English law." Thomas Jefferson, 14 *Writings of Thomas Jefferson* 57 (1907). Jefferson served on the 1776 committee which adapted Virginia's laws to republican form, the common law being assigned to him.

[20] J.F. Archbold, 1 *Complete Treatise on Criminal Procedure, Pleading and Evidence* 783 (Waterman Am. Ed. 7th ed. 1860); W.O. Russell, 1 *Treatise on Crimes and Misdemeanors* 671-672 (4th ed. 1865).

[21] *Regina* v. *West*, 2 C & K 784 (1848).

2. The Court Decreed Killings to Be "Liberty" which the Framers and Adopters of the Fourteenth Amendment Had Defined to Be "Murder."

The English common law is the dictionary which American courts use to construe the state and federal homicide statutes.[22]

By the time the Fourteenth Amendment was adopted in 1868, American legal authorities and State supreme courts had long followed the common law rule that second and third trimester abortions were murder if the child were born alive. And viability was irrelevant. If death were caused by the child being too immature to survive outside the womb, the abortion was murder.

In 1859 the American Medical Association reported the law of murder which existed throughout the United States:

> If a person, intending to procure abortion, does an act which causes the child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it into a situation in which it cannot live, is guilty of ***murder***.[23] (emphasis added).

This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.[24] This definition of murder was approved by the preeminent legal

---

[22] *Clarke* v. *State*, 117 Ala. 1 (1898); *Hamilton* v. *United States*, 26 App. D.C. 382 (1905).

[23] Reported in A. S. Taylor, *A Manual of Medical Jurisprudence* 462 (6th ed. 1866). He described the AMA report as "a complete and comprehensive exhibit of laws of each of the United States." Id., at 460.

[24] J. P. Bishop, 2 *Commentaries on the Criminal Law* 365 (4th ed. 1868); A. S. Taylor, *supra* note 23, at 462, 517 (1866).

writers of the 19th century,[25] and it was adopted by State supreme courts.[26] It was still the law in 1973.[27] In 1975 the New Jersey courts applied this law of murder to an unviable fetus born alive:

> That a fetus may be the victim of murder if it be born alive has long been a part of our common law....Coke, *Institutes* 58 (1648).[28]

For almost four centuries governments came and went in America, but this law of murder endured as the law of the land. And it is binding on the U.S. Supreme Court.[29]

Yet the Court ruled that States could not protect unborn life until the third trimester which the Court set at viability- "about 7 months."[30] But in effect (due to the Court's definition of the mother's "health") States could not protect unborn life anytime prior to actual birth. Thus the Court decreed both second and third trimester abortions to be "liberty" which the framers and adopters of the Fourteenth Amendment had defined to be "murder."

---

[25] F. Wharton, *A Treatise on the Law of Homicide in the United States* 93 (1855); Bishop, *supra* note 24; Taylor, *supra* note.23.

[26] *Clarke* v. *State*, 117 Ala. 1 (1898); *Watson* v. *State*, 117 A 2d 549 (1955); *Porter* v. *Lassiter*, 87 S. E. 2d 100 (1955); *People* v. *Chavez* 176 P. 2d 92 (1947); *Bennett* v. *State*, 377 P.2d 634 (1947); *Singleton* v. *State*, 35 So. 2d 375 (1948).

[27] 2 L. Burdick, *The Law of Crime* 156 (1946); 1 *Wharton's Criminal Law and Procedure* 434 (12th ed. 1957); R. Perkins, *Criminal Law* 30 (2d ed. 1969).

[28] *State* v. *Anderson*, 343 A. 2d 505, 508 (1975), aff'd 413A.2d 611 (1980). The court rejected the claim it was not murder because "the infants were never capable of maintaining a separate and independent existence." *Id.* at 615.

[29] The Court must accept the construction given by a state to its own statute. *Pollard* v. *Dwight*, 4 Cranch 421, 429.

[30] *Roe* v. *Wade*, supra, 160, 163.

3. The U.S. Supreme Court and the U.S. Government Claim Power to Decree the Mass Murder of Jews, or Anyone Else, to Be Liberty.

Of course, if the U.S. Supreme Court can decree the mass murder of some persons to be liberty, then it can decree the mass murder of anybody to be liberty.

Indeed, when the U.S. Supreme Court was accused of mass murder in the U.S. District Courts, the U.S. Government defended its Justices by expressly claiming that its Supreme Court must be obeyed even if it decreed the mass murder of Jews, or anyone else, to be liberty. An incredulous U.S. District Judge asked the U.S. Government:

> **[U.S. District Judge]: Let me ask you to respond to this question. The plaintiff argues in his brief that the Supreme Court in *Roe v. Wade* took a discrete group of entities and said that these entities have no right to live, and thus may be killed .... And he said if you take *Roe v. Wade* and remove the word "fetus" and just substitute most any other word you want of another discrete group, that we wouldn't be here discussing this at all. Let's say that instead of "fetus," they said "Jews." That is the one he used in his brief.**
>
> **Would you argue stare decisis to me if,under Roe v. Wade, at the whim of neighbors Jews could be put to death?**
>
> **[U.S. Govt. Lawyer]: (I) would have to agree with the doctrine of stare decisis and advance it to the court.**[31]

---

[31] *Ernest* v. *U.S. Attorney for the Eastern District of Virginia and U.S. Attorney General*, U.S. District Court in Richmond, Civ. No. 84-0858, transcript of proceedings at 21-22. This complaint attacked the validity of *Roe* v. *Wade* on the grounds that the U.S. Supreme Court cannot lawfully decree mass murder to be liberty. It demanded that the District

As victims were being killed in defiance of murder statutes, the U.S. District Judge adopted the U.S. Government's claim that he must obey the U.S. Supreme Court even if it decreed the mass murder of Jews, or anyone else, to be liberty. And on review, not one Justice had any objection to this ruling.[32]

And the Justices were accused of mass murder in a U.S. District Court on the grounds they cannot lawfully decree mass murder to be liberty. Each Justice defended himself or herself by claiming all lower courts must obey the U.S. Supreme Court "no matter how misguided" its decrees may appear to be.[33]

Thus both the U.S. Government and its U.S. Supreme Court maintain the killings by officially claiming the power to decree the mass murder of Jews, or anyone else, to be liberty.

4. The U.S. Supreme Court Has Committed Treason to the U.S. Constitution.

Chief Justice John Marshall would have called *Roe* v. *Wade* "treason to the Constitution." In *Marbury* v. *Madison*, he wrote that the purpose of the Constitution was to control the government, including judges, and the intention of its framers is the law.[34] He later ruled that the Court could not extend the Constitution "to objects not...contemplated by its framers."[35] And Marshall warned that if the Court usurped

---

Judge refuse to obey *Roe* v. *Wade*.

[32] *Ernest* v. *U.S. Attorney for the Eastern District of Virginia, and U.S. Attorney General*, cert. Denied 475 U.S. 1084 (1986).

[33] *Ernest* v. *Rehnquist, Stevens, Breyer, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, etc., U.S. Attorney, etc., U.S. Attorney General*, et al, U.S. District Court in Alexandria, Civil No. 89-732-A, Defendants' *Motion to Dismiss*, page 3. The District Court adopted this argument as law by summary decree, refusing to even allow a hearing.

[34] *Marbury* v. *Madison* at 176-180 (1803).

[35] *Ogden* v. *Saunders*, 12 Wheat. at 332 (1827).

such power, it would be "treason to the Constitution."[36]

The officials to be controlled are not free to invent a constitution more to their liking. Lawless officials can overthrow a constitution as surely as armed rebels. Indeed President George Washington warned that "change by usurpation" was "the customary weapon by which free governments are destroyed."[37]

By decreeing killings to be "liberty" which the framers had defined to be "murder," the Court exactly extended the Constitution to objects not contemplated by its framers. The Court confronts the nation with the boldest and plainest case of officials committing "treason to the Constitution."

By merely changing the names of the victims being killed, the U.S. Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany. At Nuremberg the Nazi judges claimed they could not be prosecuted for complicity in extermination and murder because "the supreme judge" had decreed the killing of Jews and other minorities to be legal, and they were obligated to obey the decrees of their supreme judge.[38] But the United States prosecuted Nazi judges for obeying their supreme judge.

Now U.S. officials conspire to impose the same Nazi doctrines on the United States which the United States itself prosecuted as extermination and murder at Nuremberg. This

---

[36] *Cohens* v. *Virginia*, 6 Wheat. at 404 (1821).

[37] George Washington, 35 *The Writings of George Washington* 229 (Fitzpatrick ed. 1940). (Washington's Farewell Address)

[38] *United States* v. *Altstoetter*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011-1014 (1951). Hitler claimed the emergency provisions of the Weimar Constitution gave him power to act as "the supreme judge." As such he decreed the killing of Jews and other minorities to be legal. Nazi judges claimed they could not be held accountable for complicity in extermination and murder, since they had acted "within the authority" of the "decrees" of "the supreme judge." *Id.* at 983-85. But the Tribunal rejected that defense: "The dagger of the assassin was concealed beneath the robe of the jurist." *Id.*, at 985.

Court claims power to decree the mass murder of Jews, or anyone else, to be legal; and government officials claim they must obey such decrees.

America has surrendered the promise that everybody has an unalienable right to life and the purpose of government is to protect the life of everyone. Now the lives of all Americans depend on the whim of government officials, as in Stalin's Russia or Hitler's Germany.

When U.S. Officials conspire to impose Nazi doctrines on the United States, then no honest person can doubt that these officials have committed treason to the U.S. Constitution.

5. The United States Being Ruled By a Giant Conspiracy to Mass Murder Is the Most Catastrophic Crime in the History of Civilization.

But if U.S. Officials cannot lawfully decree mass murder to be liberty, then the United States is now being ruled by a giant conspiracy to mass murder - a conspiracy by the leading U.S. Officials to kill children in defiance of murder statutes.

America introduced civilization to the idea that reverence for life is the future for the world. Yet America is now ruled by the most corrupt decree which the human mind can even imagine - MASS MURDER IS LIBERTY. And government is reduced to the mere matter of which mass murderer can grab power, issue orders, and be blindly obeyed.

The U.S. Government knows how to make atomic bombs, but it does not know the difference between mass murder and liberty. This is the vision which America now holds out to guide the future of the world. Now we all descend into a terrifying darkness.

B.

Roe v. Wade Criminally Defied the Constitution's Guarantee of Life to "Any Person" Because the Court Defied the Rulings of John Marshall and Used a "Guilty Until Proven Innocent" Burden of Proof to Imply that the Words "Any Person" Do Not Include the Unborn.

The Court used the correct burden of proof when it previously construed these universal words "any person."[39] Yet in *Roe* v. *Wade*, the Court actually reversed the burdens.

1.

Chief Justice John Marshall explained what the Court must prove in order to imply an exception to express and universal terms in the U.S. Constitution.

As already described, the words "any person" are express and universal, and on their face include the unborn, the same as everybody else. In order to imply an exception to exclude the unborn from the universal guarantee of life, so they can be killed with impunity from criminal laws, the Court must prove that including the unborn within the terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[40]

And the Court must prove that if the right to life of the unborn had "been suggested [to the framers] the language would have been so varied, as to exclude it."[41] The Court

---

[39] The Court ruled the words "any person" included Chinese aliens ("subjects of the emperor of China") merely saying the words are "universal." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886).

And the Court was so sure that the words "any person" included "corporations" it refused to allow counsel to argue against it. *Santa Clara* v. *So. Pac. RR*, 118 U.S. 394, 396 (1886).

[40] *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202-203 (1819). When the Constitution uses universal words, and a case is "within the very words of the Constitution," the Court may not infer an exception unless the "absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

[41] *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 644-45 (1819). When the Constitution uses universal words, " It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception."

must prove that the framers would have changed the Fourteenth Amendment to read: "Nor shall any State deprive any person, **except unborn persons**, of life without due process of law."

These are the burdens which protect the lives of all Americans from government sanctioned extermination, as happened in Hitler's Germany, or Stalin's Russia. Obviously, the Court must bear the heaviest burden of proof in order to imply an exception to the Constitution's guarantee of life to "any person" so millions of victims can be killed with impunity from criminal statutes.

Under Chief Justice Marshall's rules, the Constitution's guarantee of life to "any person" does include the unborn because "all mankind" would not unite "without hesitation" to exclude the unborn. And the framers of the Fourteenth Amendment would not have changed its guarantee of life to read "any person - except the unborn." The framers and adopters had already enacted criminal statutes to protect the lives of the unborn throughout gestation, and some abortions were murder. Thus there is no doubt that this universal guarantee of life to "any person" does include the unborn.

2.

But in *Roe* v. *Wade* the Court exactly reversed the burdens of proof described by Chief Justice John Marshall. The Court said that the evidence did not prove "with any ***assurance***"[42] that the guarantee of life to "any person" included the unborn. Assurance means "To make certain and put beyond doubt."

So the Court first assumed that the words "any person" did not include the unborn, and then it placed the burden on the unborn to prove with "assurance," to prove beyond doubt, that the words "any person" did include the unborn.

Thus the Court decided that its uncertainty (about whether the words "any person" included the unborn) justified its conclusion in *Roe* v. *Wade*. The Court attempts to prove its case, not with certainty, but with doubt. . It presumed that uncertainty, in itself, proved that the Constitution's guarantee of life to "any person" did not include the victims to be killed. Doubt assumes a new

42 *Roe* v. *Wade*, 410 U.S. at 157. (emphasis added)

43 Black's Law Dictionary, (4th ed. 1968).

role in law of justifying extermination, instead of prohibiting it.[43.1]

When courts use this burden of proof to condemn tens of millions of victims to death, Americans can not pretend that they still have a government of Constitution and laws.

Yet, the Court claims it can use this burden of proof to decree the extermination of anyone to be liberty.

C.

Roe v. *Wade* Criminally Defied the Constitution's Guarantee of Life to "Any Person" Because The Court Used Criminal Procedures to Conclude that the Words "Any Person" Do Not Include the Unborn.

Roe v. Wade was a mock trial designed to exclude truth.

And the Court maintains its killings with mock trials. It refuses to allow counsel to represent the unborn and defend their right to life. It refuses to allow its false evidence in *Roe v. Wade*, which it used to imply that the words "any person" did not include the unborn, to be confronted and cross-examined. It refuses to allow evidence to be presented to prove the Constitution's guarantee of life to "any person" does include the unborn.[44]

D.

Roe v. *Wade* Criminally Defied the Constitution's Guarantee of Life to "Any Person" Because the Court Fabricated False Evidence to Conclude that the Words "Any Person" Do Not Include the Unborn.

The history of the criminal abortion statutes proves that the

---

[43.1] An analogous burden would be a jury instruction in a capital case that the jury must presume the defendant to be guilty, unless he proved himself innocent beyond a reasonable doubt. Thus, even though reasonable people disagree over the merits, the law would require the defendant to be convicted, and advanced to death penalty phase. Thus doubts would be used to justify execution, instead of prohibiting it

Likewise *Roe* v. *Wade* asserts that a presumption that killings are right, combined with reasonable people disagreeing over the merits, justifies national extermination of millions in defiance of criminal statutes. Thus doubts are used to justify national extermination, instead of prohibiting it.

[44] The *Motion to Allow Counsel, or Guardian ad Litem, to Represent Children Unborn and Born Alive* (filed in this case, and incorporated by reference) describes the Court's procedures.

framers of the Fourteenth Amendment did not intend its guarantee of life to "any person" to exclude the unborn.

When the Amendment was adopted in 1868, over three-fourths of the ratifying States had already enacted statutes which made abortion at any stage of gestation a crime.[45] Within a few years, these criminal statutes were universal.

The ancient common law supposed that life commenced at "quickening" - when the mother felt the child stir in her womb. But judicial revision makes it impossible for the Court to assert with assurance that the common law in 1868 was any different than the abortion statutes supplanting it. As one Court observed:

> By the ancient common law...as the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of gestation.[46]

---

[45] The statutes are set out in Quay, *Justifiable Abortion, Medical and Legal Foundations*, 49 Geo. L. J. 447-520 (1961).

[46] *Lamb* v. *State*, 67 Md. 524 (1887). Some state supreme courts ruled that the common law made abortion at any stage of gestation a crime. *Mills* v. *Comm.*, 13 Pa. 631 (1850); *State* v. *Slagle*, 83 N.C. 544 (1880); *State* v. *Reed*, 45 Ark. 333 (1885). And those state supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately overruled by their legislatures which made abortion at any stage of pregnancy a crime. *Comm.* v. *Parker*, 50 Mass. 263 (1845), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). *State* v. *Cooper*, 22 N.J.L. 52 (1849), was immediately overruled by N.J. Laws at 266 (1849). *Abrahams* v. *Foshee*, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

By 1868, medical science had long rejected the ancient notion that life commenced at "quickening." The abortion statutes reflected the views of medical science that there was no time during gestation when the unborn were not alive.

In view of this history, the Court cannot meet its heavy burden to prove that the framers intended to exclude the unborn from the Fourteenth Amendment's guarantee of life to "any person," so they could be killed for convenience. This evidence is fatal to *Roe* v. *Wade*.

Thus the Court needed to rewrite 19th century medicine and law. The Court fabricated the hypothesis that the 19th century abortion statutes were intended to protect only the mothers, not the unborn. This suggested that the American people never intended the lives of the unborn to be protected by law. This hypothesis was fabricated as follows.

1.

The Court first asserted as fact, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." *Roe* v. *Wade*, 410 U.S. at 148. The Court claimed that abortions, even by physicians, were hazardous to the woman.

The only authority the Court cited to prove its assertion was a 20th century medical history book.[47] But this book only described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The abortion operation was not mentioned anywhere in the entire book.

The 19th century obstetric authorities throughout the Western world prove that abortions by physicians were "perfectly safe" to the woman.[48] The Court did not examine

---

[47] Haagensen and Lloyd, *A Hundred Years of Medicine* 19 (1943), cited in *Roe v Wade*, 410 U.S. at 148 n.43.

[48] 2 T. Denman, M.D., *An Introduction to the Practice of Midwifery* 96 (1802). He was a standard English authority. A French physician wrote

even one of these obstetric textbooks. They prove the Court's assertion of fact, "the procedure was a hazardous one for the woman," to be false.

The Court never revealed the hazardous abortion procedure to which it was referring. Actually, the 19th century physicians generally used the ancient method,[49] which one physician traced back 2000 years,[50] and which they described as "perfectly safe" to the woman.

Since abortions by physicians were not hazardous to the mother, the only motivating purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortions. Had it been the purpose of the legislators to only protect the mother, they would have simply required abortions to be performed by physicians.

2.

The Court next asserted as fact, "Abortion mortality was high."[51] The Court cited no authority to support it.

The Court intended this assertion to prove that physicians were killing so many women with abortions that women needed legislation to protect them from the medical profession.

"experience has proved that the dangers of the operation are reduced to a small matter." A.L.M. Velpeau, M.D., *A Complete Treatise on Midwifery* 530 (4th Am. ed. 1852). The preeminent American physician wrote "to the mother there is very little danger." H.L. Hodge, M.D., *The Principles and Practice of Obstetrics* 293 (1864).

[49] Dr. Denman, a standard authority in England, wrote in 1802: 'the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus," which resulted in the expulsion of the fetus from the womb, which was "perfectly safe" to the woman. 2 T. Denman, *An Introduction to the Practice of Midwifery* 96-99 (1802).

[50] F. Ramsbotham, M.D., *The Principles and Practice of Obstetric Medicine* 724 (4th ed. 1856).

[51] *Roe* v. *Wade*, 410 U.S. at 149.

The 19th century obstetric authorities prove this assertion to be false. The obstetric texts show that abortions by physicians were "perfectly safe" to women.

3.

The Court next asserted the conclusion it derived from these two false assertions of fact:

> "[A] State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." *Roe v. Wade*, 410 U.S. at 149.

This is a false inference, drawn from two false assertions of fact.

The evidence shows these abortion statutes were intended to protect the unborn. The 19th century treatises on criminal law stated that the foetus was "a living being immediately after conception" and these abortion statutes were intended to protect the lives of the unborn during all stages of gestation.[52] And State supreme courts ruled that these abortion statutes protected the lives of the unborn.[53] And authors of the statutes said their purpose was to protect the unborn.[54]

An 1860 study by the American Medical Association contrasted the striking difference between safe abortions by physicians, and lethal abortions by criminals:

> "In thirty-four cases of criminal abortion ... twenty-two were followed... by death, and only twelve were not. In

---

[52] 1 F. Wharton, *A Treatise on the Criminal Law of the United States* 656-57 (5th ed. 1861).

[53] *Smith* v. *State*, 33 Me 48 (1851).

[54] See quotes, *infra* pages 23-24, of Joynes, who authored the Virginia statute, and of the AMA, which proffered a model statute to the States.

fifteen cases necessarily induced by physicians, not one was fatal." H.R. Storer, M.D., *On Criminal Abortion in America* 43 (1860).

Since abortions by physicians were known all over the western world to be safe to women, the motivating purpose of these abortion statutes could only have been to protect the lives of unborn children from destruction by abortions. Since legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals, it proves that their motivating concern was to protect unborn life.

4.

The Court then concluded, "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe* v. *Wade*, 410 U.S. at 158.

The Court could not find even one 19th century authority to support this result.

In view of these abortion statutes, the Court cannot prove that the people who framed and adopted the Fourteenth Amendment intended its guarantee of life to "any person" to exclude the unborn, so they could be killed for convenience.

5.

The Court resurrected the ancient view that life commenced at "quickening" (about four months gestation) and arbitrarily expanded that to "viability" (about seven months gestation). Yet, by the time the Fourteenth Amendment was adopted, both science and law had rejected the ancient view.

A physician, who helped draft Virginia's 1848 state abortion statute, explained that science had rejected the ancient view that life began at quickening:

"(T)hat the embryo is endowed with an inherent vitality from the first moment of conception, and is therefore as

much entitled to the protection of the law before the period of "quickening" as after it, every well-informed physician must yield a ready assent. The old doctrine, once held by medical men...that the foetus first becomes animated, or endowed with distinct vitality, at the moment when the sensation of quickening is experienced by the mother, has been long since banished from the domain of science ... and now only finds a retreat in the dark and ancient caverns of common law...."

"(T)he civil rights of the unborn child are perfect from the very commencement of its being."

L.S. Joynes, M.D, "Foetus in Utero," *Virginia Medical Journal* 179-180, 187 (1856).

In 1860 the President of the American Medical Association condemned that ancient view as a "barbarous physiology" and urged the States to enact statutes to protect all stages of unborn life:

"This relic of a barbarous physiology needs to be exploded, and the truth should be generally promulgated, that, from the moment of conception, a new being is engendered." 13 *Transactions of the American Medical Association* 56-7 (1860)

And America's eminent professor of obstetric medicine wrote in 1860:

From the moment of fecundation, the new being becomes independent...its individuality is complete....(T)here is a progressive...advancing from one degree of perfection to another. Every protection, therefore, which is extended by human legislation to the young infant...should be equally effectual in securing the life of the embryo from

the earliest period of its existence.[55]

But the Court adopted a view of unborn life which 19th century medical science had rejected as "a barbarous physiology," which courts had ruled "never ought to have been the law anywhere,"[56] and which legislatures had condemned as criminal.

In construing the phrase in its constitution, "Everybody has the right to life," the Supreme Court of West Germany ruled that the word "everybody" did include the unborn, and the State had a duty to protect unborn life: "No distinction can be made among the several stages of developing life before birth, or between prenatal and postnatal life."

The medical and legal history show the framers and adopters of the Fourteenth Amendment made this same conclusion when they guaranteed life to "any person" without any exceptions for the unborn. They decided that unborn life was a progressive advancing from one degree of perfection to another, and there was no time when the unborn were not alive and the law could withdraw its protection of life.

Chief Justice Marshall ruled that the intention of the framers is the law, and for the Court to disobey it would be "treason to the Constitution." So the Constitution's guarantee of life to "any person" does include the unborn.

The Court claims that it can fabricate evidence to exclude anyone from the U.S. Constitution's guarantee of life to "any person." In effect, the Court claims FALSEHOOD IS TRUTH.

---

[55] H.L. Hodge, M.D., *The Principles and Practice of Obstetrics* 78 (1864). Hodge's "name had become a household word throughout the land" and his book "valued among the very first works on obstetrics ever issued from the American or foreign press." R. Penrose, M.D., *Discourse on Life of H.L. Hodge* 20-21 (1872).

[56] *Mills* v. *Comm.*, 13 Pa. at 632 (1850).

E.

Due Process of Law Has Compelled the U.S. Supreme Court to Confess in Court that it Is Guilty of Mass Murder and Extermination.

For the **127th time**, the U.S. Supreme Court is accused of defying the Constitution's guarantee of life to "any person" and deliberately exterminating millions of victims whom the Constitution endeavors to preserve.

For the **103rd time,** the U.S. Supreme Court is accused of mass murder in violation of state and federal criminal statutes.

For the **107th time**, the U.S. Supreme Court is accused of using criminal procedures to effect and maintain its *Roe v Wade* killing.

But, for three decades, the Court has never attempted to refute the charges.

Failure to deny a charge is admissible as a confession that the charge is true.[57]

At his trial for treason in 399 B.C., Socrates cross-examined one of his accusers: "(Y)ou are silent, and have nothing to say. But is not this rather disgraceful, and a very considerable proof of what I was saying?"

And this Court recognizes this ancient rule:

> "(T)he Court has consistently recognized that...silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." *Baxter* v. *Palmigiano*, 425 U.S. at 319 (1976).

Under the Court's own rulings, its silence is an admission

---

[57] 4 Wigmore, *Evidence*, Sec. 1071-1073 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." *McCormick on Evidence*, Sec. 161 (1972).

Under the Court's own rulings, its silence is an admission that the charges are true:

> "Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." *United States v. Hale*, 422 U.S. 171, 176 (1975).

The circumstances leave no doubt that the court's silence is a confession that the charges are true.

First, the evidence proves the charges to be true. The Court decreed killings to be "liberty" which States had defined to be "murder." This is mere historical fact. No denial is possible. As Chief Justice John Marshall wrote, "a fact which has existed cannot be made never to have existed."[58]

Second, the charges were made in court, the place designated by law to hear such accusations. The Judges had a legal duty to refute the charges, if they could. Chief Justice John Marshall ruled that judges who "close their eyes on the Constitution" and "condemn to death those victims whom the Constitution endeavors to preserve" commit "crime."[59] The Court had a legal duty to fully hear allegations that Roe v. Wade was wrongly decided, and to obey the evidence.

Third, the Court's steadfast silence for three decades in the face of scores of accusations is unparalleled in the legal history of the world. The Court itself cited this circumstance as making confession by silence more trustworthy:

> "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than

---

[58] *Marbury* v. *Madison*, 1 Cranch 137, 167 (1803).
[59] *Marbury* v. *Madison*, 1 Cranch 137, 179-180 (1803).

not to dispute an untrue accusation." *United States* v. *Hale*, 422 U.S. 171, 176 (1975).

Fourth, the evidence showed the United States was being ruled by a giant conspiracy to exterminate and mass murder, to overthrow the U.S. Constitution, and to impose Nazi doctrines on America. Never in history had it ever been more imperative to deny charges if they were untrue.

And **fifth**, the Justices met the charges in court by claiming that they must be obeyed even if they decreed the mass murder of Jews, or anyone else, to be liberty.

A government of laws can permit only one conclusion to be drawn from these facts: the U.S. Supreme Court confessed that the charges are true.

III.

IF *ROE* v. *WADE* IS A MISTAKE OF LAW, THEN ALL PUBLIC OFFICIALS, OR CITIZENS, WHO SUPPORT IT MAY BE GUILTY OF COMPLICITY IN EXTERMINATION, INCLUDING MASS MURDER.

We now arrive at the most important legal question in world history: Can the U.S. Supreme Court lawfully decree national extermination and mass murder to be liberty? The U.S. Supreme Court claims that it can.

But if *Roe* v. *Wade* is a mistake of law, then all the government officials, news media persons or citizens who helped to support and maintain it may be guilty of complicity in national extermination, including mass murder.

The general rule is that mistake of law is no excuse for breaking the law.[60] The Constitution's *ex post facto* provisions do not apply to judicial decisions which are a mistake of law.[61]

---

[60] R. Perkins, *Criminal Law* 920 (2d ed. 1969); Oliver Wendell Holmes, *The Common Law* 41 (Howe ed. 1963).

[61] *Ross* v. *Oregon*, 227 U.S. 150, 161 (1912).

The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply in homicide cases, much less national extermination and mass murder.[62] But even if it did, no reliance on *Roe v. Wade* could be reasonable in view of the above facts. So the law applied at Nuremberg applies here. Obedience to the decrees of the supreme judge is no defense to national extermination and mass murder.

Even if the U.S. Supreme Court held a gun to a man's head, and threatened death unless he obeyed *Roe v. Wade*, it would not be a defense to homicide. Blackstone stated the law: "(H)e ought rather to die himself than escape by the murder of an innocent."

In explaining why the Western democracies bowed to violence and the Nazis got away with monstrous crimes, Winston Churchill merely quoted Machiavelli: "Men avenge slight injuries, but not grave ones." Thus America is now ruled by a giant conspiracy to mass murder.

"Political language," wrote George Orwell, "is designed to make lies sound truthful and murder respectable." In his novel *1984*, Orwell described a tyranny which claimed, "Whatever the Party holds to be truth is truth," and defrauded its subjects into obedience with its slogans "FREEDOM IS SLAVERY" and "WAR IS PEACE."

This science fiction may appear implausible, yet for three decades the United States has been ruled by a Court which claims, "Whatever the Court holds to be truth is truth," and maintains obedience with its slogans- MASS MURDER IS LIBERTY, FALSEHOOD IS TRUTH, and TREASON IS LAW.

---

[62] *Model Penal Code*, Section 2.04, Ignorance or Mistake (Proposed Official Draft 1962) and comments in the *Model Penal Code*, Tentative Draft No. 4, Comments on Sec. 2.04, page 138. R. Perkins, *Criminal Law* 928 (2d ed. 1969). A. Ernest, *Mass Murder is Liberty* 74-104 (1998)

But all that will be swept away. The primitive idea, that some can gain by killing others, has no future. The message of our Declaration of Independence becomes more true every day - reverence for life is the only path to the future. Wherever we are, wherever in the universe our kind may go, our essential thought, the thought necessary for us to exist, will always be reverence for life.

CONCLUSION

Merely overruling *Roe* v. *Wade* will not remedy the wrong. The Court misguided this nation and the entire world. Now the Court must speak the obvious truth. The U.S. Constitution's guarantee of life to "any person" does include the unborn. State and federal governments have a duty to protect unborn life.

Alan Ernest,
Counsel

Supreme Court, U.S.
FILED
SEP 1 - 2005
OFFICE OF THE CLERK

Nos. 04-1244, 04-1352

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

Amicus Brief of Life Legal Defense Foundation In Support of Petitioners

---

CATHERINE W. SHORT*
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558
(707) 224-6675
**Counsel of Record*

ANDREW W. ZEPEDA
Of Counsel
Lurie, Zepeda, Schmalz & Hogan
9107 Wilshire Blvd., Suite 800
Beverly Hills, CA 90210-5533
(310) 274-8700

Attorneys for Amicus

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of Amicus	1
Summary of Argument	2
I. The Mandate of the Seventh Circuit Is Nonsensical	3
II. The Mandate of the Seventh Circuit Is Contradictory	5
III. Any Injunction Issued Pursuant to the Seventh Circuit's Mandate Would Be Impermissibly Broad and Imprecise	6
Conclusion	8

TABLE OF AUTHORITIES

CASES:

Page

Feminist Women's Health Center v. Blythe, 32 Cal. App. 4th 1641, 39 Cal. Rptr. 2d 189 (1995) 2

Planned Parenthood Association of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus, 14 Cal. App. 4th 162 (1993) 2

U.S. v. Local 30, United Slate, Tile and Composition, Roofers 871 F.2d 401 (3d Cir. 1989) 4

U.S. v. Private Sanitation Industry Ass'n of Nassau / Suffolk, Inc., 995 F.2d 375 (2d Cir. 1993) 4

STATUTORY PROVISIONS:

18 U.S.C. § 248 2
18 U.S.C. § 1951 ..... 2, 3
18 U.S.C. § 1962 4
18 U.S.C. § 1962(a) 4
18 U.S.C. § 1962(b) 4
18 U.S.C. § 1962(c) 4
18 U.S.C. § 1962(d) 4
18 U.S.C. § 1964 2
18 U.S.C. § 1964(a) 3, 4
California Code of Civil Procedure § 1021.5 2
Fed. R. Civ. P. 65 7

I

Interest Of Amicus[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was established in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience (often called "rescues") created the need for attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions under state law for trespass or blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990's, most of these pro-life advocates had turned to other, entirely lawful means of preventing abortions, including assisting women in crisis pregnancies, counseling women outside abortion facilities, and picketing, leafleting, and praying at schools, colleges, and other appropriate locations, including abortion facilities. Rather than applauding this conversion to entirely lawful forms of pro-life activism, abortion supporters have almost uniformly refused to acknowledge that there is essentially any difference between the rescue blockades of the late '80's and the completely lawful protest of the '90's to the present. They consider both to be unlawful interference with, and harassment of, women seeking abortions. The only difference is that the civil disobedience of the '80's occurred only sporadically, whereas sidewalk counselors and picketers appear weekly, sometimes daily—and the police will not arrest these pro-life activists because their conduct is lawful. For that reason, abortion providers have increasingly sought injunctions against pro-life picketers as a way of limiting protests.

---

[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus Life Legal Defense Foundation made any monetary contribution to its preparation. Written consent of the parties to the filing of amicus briefs have been filed with the clerk.

Unfortunately, in many cases, limitations on their First Amendment rights are not all that pro-life activists have to fear in actions for injunctive relief. Frequently, abortion providers seek attorney fees that may be available either under statutes such as RICO (18 U.S.C. § 1964) and FACE (18 U.S.C. § 248), or pursuant to state private attorney general statutes, such as California Code of Civil Procedure § 1021.5. See, e.g., *Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641 (1995), cert. denied 516 U.S. 987 (upholding award of attorney fees to clinic against pro-life picketers); *Planned Parenthood Association of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus*, 14 Cal. App. 4th 162 (1993) (same). These provisions chill pro-lifers not only in their expressive activities, but in their defense of those activities in the courts.

Amicus LLDF is very concerned about the abuse of injunctive relief both as an end (chilling or stifling free speech rights) and a means (to attorney fees.) The Seventh Circuit's mandate directing the district court to determine whether four unspecified acts or threats of violence committed over a dozen years ago "are sufficient" to support an injunction, and prevailing party status for respondents, is just the sort of misguided approach to injunctive relief that has made the courts into the enemy, rather than the guardian, of free speech rights.

Summary of Argument

The Seventh Circuit's mandate makes one thing perfectly clear: the court is determined to give respondents one more chance to achieve some measure of victory in this litigation. In pursuit of this goal, the court not only engaged in a tortuous reading of the Hobbs Act, 18 U.S.C. § 1951, as discussed at length in the parties' brief, but also has issued mandates that defy both logic and law. The Seventh Circuit has remanded the case to the district court for a backwards

exercise of its equity jurisdiction, governed by conflicting commands, that can only result in an impermissibly vague injunction.

I. The Mandate of the Seventh Circuit Is Nonsensical

In remanding this matter to the district court, the Seventh Circuit was quite explicit in its instructions as to the order in which the court is to address the remaining issues: the district court is *first* to determine whether the four unspecified acts or threats of violence found by the jury are sufficient to support some form of injunctive relief. Then, "[i]f and only if the district court concludes that some form of injunctive relief would be justified based on the four remaining acts found by the jury, that court will have to confront a more complex legal issue, namely, whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO." OR Pet. App. at 8a.[2]

This approach is topsy-turvy. It is as if a case were remanded first to determine what sentence the defendant should receive and then to determine if a crime has been committed, or first to determine if the plaintiff should recover damages and then to determine if the elements of the tort had been proved.

Particularly in the context of injunctive relief under RICO, this approach is nonsensical. Assuming *arguendo* that injunctive relief under RICO is available to private litigants, the equity jurisdiction afforded to district courts under RICO is nonetheless limited by an express statement of purpose: "to prevent and restrain violations of section 1962." 18 U.S.C. § 1964(a). Section 1962 prohibits conduct otherwise not criminal in and of itself, e.g., the investment of income derived from racketeering activity for the purpose of acquiring an interest in, establishing, or operat-

---

[2] All citations to the Petition Appendix (OR Pet. App.) are to the pertinent documents in No. 04-1352.

ing any enterprise (18 U.S.C. § 1962(a)), the acquisition of an interest in or control of an enterprise through a pattern of racketeering activity (18 U.S.C. § 1962(b)); the conduct of an enterprise's affairs through a pattern of racketeering activity (18 U.S.C. § 1962(c)); or the conspiracy to violate any of the foregoing provisions (18 U.S.C. § 1962(d)). The commission of miscellaneous crimes—even the predicate offenses that may give rise to a "pattern of racketeering activity"—is not prohibited by RICO since these offenses are crimes in themselves.

Hence, a district court's authority to issue injunctive relief under RICO is limited to the prevention of RICO violations, i.e., violations of section 1962.[3] Injunctive relief is not authorized under RICO merely to prevent the commission of predicate offenses, particularly predicate offenses that are crimes punishable under state law. Thus the examples Congress expressly delineated in section 1964(a) as appropriate injunctions under RICO include:

> ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

---

[3] See, e.g., *U.S. v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc.*, 995 F.2d 375 (2d Cir. 1993) (enjoining defendant from participating directly or indirectly in carting industry and associating with co-defendants or known members and associates of organized crime for any commercial purpose was within scope of RICO's civil remedies.); *U.S. v. Local 30, United Slate, Tile and Composition Roofers*, 871 F.2d 401 (3d Cir. 1989), cert. denied, 493 U.S. 953 (1990) (individual defendants enjoined from participating in union's affairs and continuing to be employed in construction industry within union's jurisdiction).

In contrast to these explicit proscriptions on activities directly related to operating a racketeering enterprise, the Seventh Circuit seems to envision the district court conducting an inquiry into whether four unspecified acts or threats of violence could justify "some form of injunctive relief," unmoored from any specific statutory authority for the exercise of its equity jurisdiction. Only after it has determined if "some form of injunctive relief" is justified, need the district court determine if it can squeeze the injunction into the RICO box by finding the acts to be RICO predicates.

In sum, the Seventh Circuit's mandate directs the lower court to consider entering an injunction that exceeds its jurisdiction.

II. The Mandate of the Seventh Circuit Is Contradictory

In its original mandate of February 26, 2004, the Seventh Circuit remanded the case to the district court to determine whether the four unspecified acts or threats of violence "are sufficient to support *the nationwide injunction it imposed.*" OR Pet. App. at 30a (emphasis added). This limitation was reinforced where the court noted that the district court "may conclude that the proper interpretation of § 1951(a) is immaterial, if it decides that the four acts or threats of physical violence found by the jury are not sufficient alone to support *the nationwide injunction.*" OR Pet. App. at 31a (emphasis added).

However, in its order of January 28, 2005, after further briefing by petitioners showed the unlikelihood of the four acts supporting the nationwide injunction, the Seventh Circuit *sub silentio* altered its mandate, holding, "The only remaining question, to repeat, is *whether a different injunction*, tailored to the violations found, would be appropriate." OR Pet. App. at 7a. But later in the same opinion, it seemed to allow for either the same *or* a different injunction: "The

only remaining question is whether *any injunction* is appropriate. . . ." OR Pet. App. at 17a (emphasis added).

The Seventh Circuit is also unclear as to the scope of the district court's inquiry. In elaborating on how the district court is to determine the necessity of injunctive relief, the Seventh Circuit admonished: "This is not, however, an invitation either to the court or to the parties to reopen the record. If there is anything at all that is to be done, it must be based on the record that has already been built." OR Pet. App. at 7a–8a.

However, in discussing the same issue in the concluding paragraph, the Seventh Circuit notes that the Freedom of Access to Clinic Entrances Act "has now been in effect for five more years since the district court first considered the necessity of a nationwide injunction, and experience may require a reassessment of the Act's impact." OR Pet. App. at 16a. The Seventh Circuit's musing about more recent "experience" is, in fact, "an invitation . . . to reopen the record." How can the court reassess the experience with the Act's impact if not by engaging in another round of evidentiary hearings?

The conflicting directions given to the district court reveal the Seventh Circuit's own failure to grasp what it wants the lower court to do, other than give the respondents one more chance.

III. Any Injunction Issued Pursuant to the Seventh Circuit's Mandate Would Be Impermissibly Broad and Imprecise

In directing the district court to determine whether injunctive relief is appropriate, the Seventh Circuit noted, "It is not even clear whether the acts of violence were sufficiently well defined to justify any injunctive relief." OR Pet. App. at 7a.

To call this an understatement is itself an understatement.

Over the course of a seven-week trial, involving dozens of witnesses and hundreds of exhibits, Respondents argued that Petitioners and "hundreds or thousands of co-conspirators"[4] were responsible for dozens of acts or threats of violence, along with hundreds of other alleged criminal acts. These alleged acts or threats of violence ranged from kicking cars to making threats on radio programs to destroying medical equipment to shoving patients or clinic employees to leaving statements on a hotline number to entering a clinic and making remarks about "casing the place."

Out of this morass of evidence, the jury found that some defendant(s), or some person(s) associated with defendant PLAN, had committed four "acts or threats of physical violence to person or property." OR Pet. App. at 143a. No further specification of those acts is available to the district court.

Because the district court has no way of knowing which particular acts or threats the jury found, much less who committed them or where or when, any injunction to "redress" these acts could only be couched in the most general terms. Indeed, as all the court knows is that these were acts or threats of physical violence to persons or property in the context of this proceeding, the most narrowly tailored injunction it could impose would prohibit the petitioners from committing acts or threats of violence against the persons or property of respondents or their employees or clients.[5]

Such an injunction would clearly not comply with Federal Rule of Civil Procedure 65, which requires that every

---

[4] Plaintiff's Amended RICO Case Statement, S. App. 378, 381.

[5] Indeed, this is how the district court dealt with the unspecified acts or threats of violence in its order of July 6, 1999, imposing a nationwide injunction. That order prohibits "damaging, destroying, or stealing property of" or "using violence or threat of violence against" any Plaintiff Clinic or any of its employees, volunteers, or clients. OR Pet. App. at 93a. In effect, the district court simply divided violence against property and violence against persons into two different provisions.

injunction "be specific in its terms" and "describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Rather than being specific, an injunction against acts or threats of violence is more akin to the cry of an exasperated parent: "Whatever you kids are doing out there, cut it out!" While such an admonition may be effective in certain contexts, it hardly satisfies the requirements of due process, particularly given the wide array of conduct and speech that respondents claim constitutes acts or threats of violence.

Such a vague injunction, particularly the provision concerning "threats" of violence, would also be a powerful weapon in respondents' hand to chill the petitioners' advocacy. It would effectively turn over prosecution of petitioners for a vast array of criminal statutes to private parties—private parties ideologically opposed to respondents who will have every incentive to threaten or bring contempt proceedings for claimed violations.

Conclusion

There is a reason the Seventh Circuit's mandate is so illogical and far-fetched. It can be summed up in two words: attorney fees. The reality of the court's mandate is that it has nothing to do with injunctive relief for the respondents. No one would seriously contend that the respondents will sleep more soundly if the district court enjoins Joe Scheidler and Tim Murphy and Andrew Scholberg from committing acts of violence against them, i.e., acts already stringently punishable as crimes.

In truth, the "relief" sought by the respondents, which the Seventh Circuit is loathe to deny them, is simply prevailing party status, and with that, the right to collect millions of dollars in attorney fees. For the sake of giving respondents one last (?) chance at an award of fees, the

Seventh Circuit has defied this Court's mandate putting an end to this litigation.

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

CATHERINE W. SHORT*
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558
(707) 224-6675
**Counsel of Record*

ANDREW W. ZEPEDA
Of Counsel
Lurie, Zepeda, Schmalz & Hogan
9107 Wilshire Blvd., Suite 800
Beverly Hills, CA 90210-5533
(310) 274-8700

Attorneys for Amicus

Supreme Court, U.S.
FILED
OCT 20 2005
OFFICE OF THE CLERK

Nos. 04-1244 & 04-1352

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL.*,

Respondents.

OPERATION RESCUE,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL.*,

Respondents.

On Writs of Certiorari To The United States Court of Appeals For The Seventh Circuit

---

BRIEF OF EMILY LYONS AS *AMICA CURIAE* IN SUPPORT OF RESPONDENTS

PAMELA L. SUMNERS
528 N. HUMPHREY AVENUE
OAK PARK, IL 60302
312.213.1725
Counsel of Record for Amica Curiae Emily Lyons

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICA CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

VIOLENT CRIMINAL ACTIVITY IS NEITHER PROTECTED SPEECH NOR HEROIC POLITICAL DISSENT 4

A. Violent Criminal Activity Is Not Protected Speech 4

B. Violent Criminal Activity Is Not Heroic Political Dissent 11

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Adderly v. Florida, 389 U.S. 39 (1966) 6

Brown v. Louisiana, 383 U.S. 131 (1966) 6

Congressional Materials

91 Cong. Rec. ¶ 11,912 (1945) 12

Other Sources

"Rudolph Sentenced to Life in Atlanta Bombings," *Chicago Free Press* (Aug. 24, 2005) 13

Frederick Clarkson, "Terror in the Name of the Lord," *Ms. Magazine* (Dec. 2002) 7

Abigail A. Fuller, "Conflict Resolution and Conservative Ideology: The Use of Civil Disobedience by Operation Rescue," *available at* www.colorado.edu/conflict/ 6, 10

Stephen J. Hedges, *et al.*, "Abortion Rights Advocates Have Alleged a Conspiracy, but the Jury is Still Out," *U. S. News & World Rep.* (Nov. 14, 1994) 8

Dr. Warren M. Hern, Report to U.S. Department of Justice, "Anti-Abortion Activity at Boulder Abortion Clinic, 1975-1995," *at* www.drhern.com/jdrpt195.htm 9

Blake Morrison, "Special Report: Eric Rudolph Writes Home," *USA Today* (July 6, 2005) 15, 16

"NOW v. Scheidler Timeline: The complete story,"

National NOW Times (Fall 2002) 7

"Olympic bomber gets two life sentences for attack," *Agence France Presse – English* (Jul. 18, 2005) 15

George Orwell, "Politics and the English Language," *in The Orwell Reader* 363 (1984 ed.) 5

George Orwell, *1984* (1949) 7

Jay Reeves, "An unrepentant Rudolph gets life in prison for deadly bombing at abortion clinic," The Associated Press Online (July 18, 2005) 14

Eric Robert Rudolph, "Statement of Eric Robert Rudolph," *reprinted in* The Birmingham *News,* (Apr. 14, 2005) 16

Joni Scott, "From Hate Rhetoric to Hate Crime," *The Humanist* (Jan./Feb. 1999) 8

Add Seymour, Jr., "Bomber Sentencing Monday in Atlanta: Olympic blast victims will face Rudolph," Atlanta *Journal-Constitution* (Aug. 21, 2005) 13

Howard Sitkoff, *The Struggle for Black Equality* (1993 ed.) 5

Jill Stanek, "An interview with Illinois pro-life leaders who make history," *Illinois Leader* (July 15, 2002) 10

U.S. Department of Justice Press Release, "Eric Rudolph Charged In Olympic Park Bombing" (Oct. 14, 1998), *available at* www.usdoj.gov/ opa/pr/1998/ October/477crm.htm 14

INTEREST OF THE AMICA CURIAE[1]

At 7:30 a.m. a bomb that had been placed in a potted plant outside the clinic I worked in exploded about 15 feet from where I was standing. Someone who considers himself pro-life murdered a police officer.

The pipe bomb contained dynamite and nails. I am often asked what my injuries were. I usually ask them, "How much time do you have?" I had first, second, and third degree burns. The trauma surgeon described it by saying that I had hundreds of wounds. He had served in Desert Storm and had seen others who had been bombed. He was shocked to see a bombing victim back in the United States.

Metal tore my left eye to the extent that it had to be removed. Metal also shot into my right eye. After several operations and months of waiting, I am able to see well enough to read a little, but my sight will never be like it was. My face, eye sockets, and teeth were broken, my left ear was ruptured, my right hand was mangled, a hole about the size of a fist was torn in my abdomen, exposing my intestines. Both knees were so full of nails that they had to be opened and the nails cleaned out before they would move again. The skin was torn off both shins, exposing bone and requiring skin grafts. Both bones in my

---

[1] No counsel for any party had any role in authoring this brief, and no persons other than *amica curiae* and her counsel made any monetary contribution to its preparation and submission. Written consents from the parties to the filing of *amicus* briefs in this case are on file with the Clerk of the Court.

lower left leg were shattered, and the doctors feared amputation of one leg. I had dozens of complete nails inside my body, and hundreds of metal fragments and other debris. The blast was so strong it shredded my clothing and blew my shoes off.

I have had 12 operations this year and expect many more next year. As a result, I am a trained nurse with 20 years experience who cannot write, read or stand for long periods of time.[2]

Emily Lyons, the author of these words, has an interest in seeing that terrorists like Eric Rudolph, who planted the 1998 Birmingham bomb that so gravely injured her, are vigorously prosecuted, including under federal statutes. As a survivor of that bombing who can no longer work as a nurse, she is deeply troubled by Petitioners' attempts to cloak violence in the garb of protected expression.

Emily Lyons simply reported to work at the women's clinic where she had served for four years, New Woman/All Women, on January 29, 1998. No one asked her if she consented to trade her eyesight or physical vitality for the privilege. Having endured the horror of that day and the horror of repeated surgeries to return to her a fraction of her former body and life before that day, she retains the courage and the belief in the rule of law to caution her fellow citizens: "Do not allow anyone or anything, be it fear or intimidation, to make you lose sight

---

[2] This speech, "To Hell and Back," was given by Emily Lyons in 1998. Emily Lyons has now had 21 surgeries.

of the main goal–to provide and support a woman's right to reproductive health as they see fit." *Id.*

SUMMARY OF ARGUMENT

This case is not a judicial plebiscite on the right to peaceful protest activities, although Petitioners labor mightily to transform it into one.

Contrary to Petitioners' suggestion, bombs, blockades and blitzes of women's health clinics share no kinship with protected forms of nonviolent expression epitomized by the civil rights sit-ins that are seared into our nation's conscience. Nor do they have anything in common with political protestors of any stripe accorded First Amendment protection. Those who plant bombs or use clubs, fists, violent blockades, or nefarious means to express their dissent from this Court's substantive due process jurisprudence are criminals who should be punished as criminals, however sincere their religious or political convictions. Architects and purveyors of violence, whether to the degree Emily Lyons suffered or to the degree the jury found in this case, are criminals, not advocates, hoodlums, not heroes. "Free speech" is a value that should lead us as a polity to the truth. "Free speech," in the hands of the Petitioners, is a tool of dissimulation.

ARGUMENT

VIOLENT CRIMINAL ACTIVITY IS NEITHER PROTECTED SPEECH NOR HEROIC POLITICAL DISSENT

Petitioners describe these proceedings as Dickensian,[3] but their briefs are actually more evocative of George Orwell. Petitioners appropriate the mantle of the Civil Rights Movement to cloak tactics never countenanced by that movement. They wear the democratic constitutionalist's robes before this Court, but only by way of camouflage. Their rhetoric is not their reality.

A. Violent Criminal Activity Is Not Protected Speech.

In Petitioners' Newspeak, acts of violence and physical blockades are merely "vigorous protests." (Scheidler Pet. for Cert. at 1.) What was experienced by patients at the clinics as assault and obstruction is resurrected on the tabula rasa of legal briefs as "sit-ins." (OR Pet. for Cert. at 3, 4 n.3.)[4] They insist that a factually specific, narrow ruling by the Seventh Circuit, dealing with a discrete injunction, has extravagant reach. They warn of "the threat posed by the decision below ... to labor and

---

[3] Petitioners liken this proceeding to the Chancery suit, *Jarndyce v. Jarndyce*, described in Charles Dickens' *Bleak House*.

[4] Interestingly, OR concedes that the conduct it now casts as "demonstrations" and "sit-ins" by "political protestors" were in fact "obstructive." (*See* OR Pet. for Cert. at 5.)

political protestors." (Scheidler Rep. Br. at 10.) They insist, "There is no reason why, if the Seventh Circuit's latest interpretation of the Hobbs Act is correct, RICO actions based on predicate Hobbs Act offenses could not also be punished against social protestors of all stripes, including those demonstrating for civil rights, environmental causes, or animal rights." (Scheidler Pet. for Cert. at 23.) Conveniently, they forget that NOW never once attempted to sue true protesters, those who exercise their First Amendment right to pray, leaflet, shout, or even engage in name-calling.

Petitioners' revision of the history of clinic blockades and clinic violence should be noted for the Orwellian feat that it is: "the defense of the indefensible." George Orwell, "Politics and the English Language," in *The Orwell Reader* 363 (1984 ed.). In this rhetorical world, the Civil Rights sit-ins, the objective of which was to *secure* access to public accommodations on the same terms as white citizens, are analogized to the blockaders at the clinics. But the truth of the desegregation sit-ins cannot be revised by false analogy: the protestors wanted a place at the table, not to keep other patrons from theirs. The sit-in manual commanded: "Don't strike back, or curse if attacked ... Don't block entrances." *See* Howard Sitkoff, *The Struggle for Black Equality* 67 (1993 ed.).

This Court knows the difference between seeking access and blocking it, having upheld the right "in a peaceable and orderly manner to protest by silent and reproachful presence,[5] in a place where the protestant has

---

[5] Or, it should be noted, to chant, speak, counsel or attempt to persuade, consistent with reasonable time, place and manner

every right to be," *Brown v. Louisiana*, 383 U.S. 131, 142 (1966), while allowing to stand the criminal-trespass convictions of 200 students who blocked access to the jail to protest the arrest of civil rights demonstrators. *Adderly v. Florida*, 389 U.S. 39 (1966). The tactics Petitioners seek to defend call to mind not the lunch counters of Greensboro, but George Wallace blocking the doors at Tuscaloosa.

The Respondents' construction of the Hobbs Act would not render the Reverend King a racketeer or transform Gandhi into an extortionist. Contrary to Petitioners' insinuations, it is not "social protest" that we punish when we punish violence. Social protest does not mangle bodies. Gandhi had no gunpowder. Dr. King did not block white citizens from exercising the franchise by burning the voting booth or forcing them to run a gauntlet of angry African-Americans hurling threats or fists at them. Fifty-lb. sticks of dynamite, galvanized nails, and anti-personnel backup bombs are not political tracts.

The rhetorical sleights-of-hand that characterize Petitioners' image-sculpting provide insight into why they chose to compare the violent persons in their ranks to those peaceful protestors who marched over Selma's Edmund Pettus Bridge. Operation Rescue is a two-faced Janus, woundedly protesting its moderation here while presenting quite another face to the troops. For public and judicial consumption, "blitzes" and blockades are reinvented as Clara Bartonesque "rescues," and angry haranguers of patients and clinic staff are "sidewalk counselors." *See* Abigail A. Fuller, "Conflict Resolution and Conservative

---

constraints. Threats of bodily harm are not reasonable.

Ideology: The Use of Civil Disobedience by Operation Rescue," *available at* www.colorado.edu/conflict/. In Petitioners' briefs here, a clinic is a clinic. Among the troops, a clinic is "a 'death mill' (the word 'mill' connoting a factory where procedures are performed rotely) or an 'abortuary.'" *Id.* Pro-choice volunteers who assist patients in navigating the gauntlet at an Operation Rescue occupation are "deathscorts, a play on the word escort, which is used by prochoice people." *Id.*

In this Court, Petitioners are respectful and respectable citizens who would never use language worthy of Big Brother's "Two Minutes' Hate"[6] as they exhort their own to occupy the premises and obstruct access to medical procedures. When the public relations antennae are relaxed in their own circles, however, their words are less measured and their message delivered with a menace that is not always encrypted. When forming PLAN, Petitioner Scheidler vowed to stop abortion "by any means necessary" and proclaimed "a year of pain and fear" for anyone seeking or providing an abortion. *See* "NOW v. Scheidler Timeline: The complete story," *National NOW Times* (Fall 2002), *available at* www.findarticles.com. The man who described his brainchild as a "pro-life Mafia" in other fora professes astonishment at being sued under RICO in the judicial forum. *See id. See also* Frederick Clarkson, "Terror in the Name of the Lord," *Ms. Magazine* (July 2002), *at* www.msmagazine.com.

Petitioner Scheidler insists that he does not condone violence and that he supports robust speech. He has a strange notion of violence and a strange concept of the

---

[6] *See* George Orwell, *1984* (1949, HBJ: New York).

contours of the First Amendment.

The motel marquee for a PLAN conference after a spate of bombing plots and clinic attacks blared "WELCOME PRO-LIFE ACTIVISTS–HAVE A BLAST," and some attendees wore firecrackers on their nametags. *Id.* A letter from clinic arsonist Curt Beseda was read to the crowd. The conference "epitomized the brazen yet banal nature of organized antiabortion extremism – a rah-rah atmosphere, like some perverse parody of a pep rally, in which threats of future violence were cloaked as free speech, and past criminal acts were celebrated as valid tools for intimidating fellow citizens." *Id.* The following year, a day after Petitioner Scheidler admitted that he was "casing the place," Summit Women's Health Clinic "protestors" invaded the clinic and expressed their dissent through serious vandalism. *Id.*

Scheidler's parsimoniously applied scruples about violence do not prevent him from visiting Michael Bray, who conspired to bomb over 10 clinics, and Curt Beseda who, in addition to his pyrotechnical prowess, had ties to a group who kidnaped a doctor who performed abortions (and his wife) and held them under death threats for eight days demanding that they sign a pledge to perform no abortions.[7] Stephen J. Hedges, David Bowermaster, and Susan Headden, "Abortion Rights Advocates Have

---

[7] The FBI investigated this kidnaping because the death threats made during the abduction in order to secure the pledge violated the Hobbs Act. The kidnapers were members of the band of murderers known as the Army of God, was later convicted of torching two Florida clinics. Joni Scott, "From Hate Rhetoric to Hate Crime," *The Humanist* (Jan./Feb. 1999), *at* www.thehumanist.org/humanist/articles/scott.html.

Alleged a Conspiracy, but the Jury is Still Out," *U.S. News & World Rep.* (Nov. 14, 1994). He spoke frequently with John Brockhoeft, serial clinic arsonist. *Id.* Of his meetings with bombers, he shrugs, "Just because someone commits a crime doesn't mean they are a bad person." *Id.*

As one observer noted, "If Scheidler has argued against the use of violence, it has not always been clear from his writings." *Id.* Among the letters that he sent to his confederates: "Thanks so much for sending the photographs of our gang in front of the bombed-out abortuary – great scene. Appreciate your help. Keep up the good work." *Id.* He told another supporter by letter that a man who abducted a doctor who provided abortion care "has a lot to teach us." *Id.*

Petitioner Operation Rescue has from time to time made public assassination threats against a physician who provides abortion services. Dr. Warren M. Hern reported to the Department of Justice that Randall Terry, founder of OR, led a demonstration on clinic premises during which he prayed for Dr. Hern to be "executed." He repeated his prayerful threat over the radio three years later; two days after that broadcast, the doctor who replaced the assassinated Dr. Gunn of Pensacola was found murdered in Birmingham, with money in his pocket. *See* Dr. Warren M. Hern, Report to U.S. Department of Justice, "Anti-Abortion Activity at Boulder Abortion Clinic 1975-1995," *at* www.drhern.com/jdrpt195.htm.[8]

---

[8] Dr. Hern also reported that Scheidler's scheduled appearance at the Boulder clinic was shortly preceded by a brick through the window and proceeded apace with a telephone harassment campaign that was later traced to the wife of the man who had invited Scheidler

In this Court, Petitioners liken themselves to the heroes of this nation's epic nonviolent struggle to end racial disenfranchisement, but elsewhere, the martial metaphor is everywhere. Petitioner Scheidler has made plain his distaste for peaceful protest and his yearning for jihad in other fora. "[W]e will win because we're on God's side. It's a holy war," he told a right-wing Illinois publication. Jill Stanek, "An Interview with Illinois pro-life leaders who make history," *Illinois Leader* (July 15, 2002), *at* www.illinoisleader.com.

As one scholar has noted, "In contradiction to Operation Rescue's prolife stance, much of the organization's language is militaristic." *See* Fuller, *supra*. OR, unlike protest movements that actually are committed to nonviolence, uses "language that evokes images of violence, including words that evoke a militaristic analogy" with the antiabortion movement. *Id.* For example, an OR chapter in Colorado terms its blockades "Minutemen Rescues," evoking the citizens' militia in the American Revolution. *Id.* Other OR literature exhorts, "We are among the front-line troops in the battle for life. Together we will win! We have an army of people. The battle is raging ... The Commander is calling most of us to the front lines." *Id.*

These words match the tactics of PLAN and OR conspirators in their virulence. Self-evidently they bear no

---

to town. *Id.* As for OR in the Denver area, one police captain saw no dominant influence of peace when the group came to town. "This never took on the appearance of a peaceful demonstration. It certainly was not nonviolent. It's not peaceful when you rush a police line." *See* Fuller, *supra*.

resemblance to the words or deeds of the Reverend King. Nor are they consonant with any respect for or understanding of the nonviolence principle that underlies Gandhi's and Dr. King's concept of civil disobedience. The nonviolent activist is willing "to incur, but not in turn inflict, suffering," and he is assiduously trained in the use of nonviolent action and in the philosophy of nonviolence. *Id.* OR "trains" its "rescuers" the day of its arrival, and nonviolence is not "explained in any Operation Rescue literature, except in reference to the Bible allowing [violence] when man's laws conflict with God's laws." *Id.*

Those who "express" their protest of abortion with fists, projectiles, and bombs do not stand in any venerated First Amendment tradition. They are in fact criminals, despite Petitioners' apologia for them.

B. Violent Criminal Activity Is Not Heroic Political Dissent.

Apparently, in Petitioners' view, the purity of the criminal's commitment to his principles means that his deeds should go unpunished. Punishing crime regardless of the actor's motivations, Scheidler warns, would snare what popular understanding would brand as "politically correct" activists, too, such as civil rights protestors, environmentalists, and animal rights advocates. (Scheidler Pet. for Cert. at 23.) This contention is among the few unassailably straightforward statements in Petitioner Scheidler's brief.

To the extent that, as Scheidler speculates, PETA, the Sierra Club, or the NAACP acquire dynamite or bombs and plan to use them to demonstrate their disdain for

furriers, power plants, or bigots, they should be treated as criminals regardless of their views about the morality of animal vivisection, global ecology, or equal rights. Any deviation from the neutral enforcement of laws punishing terrorist acts because of sympathy with the actor's viewpoint does violence to the rule of law.

That very evenhandedness is a good thing on which the integrity of our legal system depends. The fact that we cannot elect to leave unpunished some criminals because we appreciate their sincerity while we would punish others appears to have eluded Petitioners. What is good for PETA is good for Operation Rescue, or, as the sponsor of the Hobbs Act put it, "Crime is crime, no matter who commits it." 91 Cong. Rec. at ¶ 11,912 (statement of Rep. Hobbs) (1945).

Petitioners' own view that they have a "moral exemption" from laws that bind the rest of us, that the First Amendment is tensile enough to stretch its protective fabric over their crimes, reflects the same moral smugness and certitude that those convicted of terrorism in connection with their antiabortion holy war demonstrate with such tragic consequences. A rather cavalier attitude toward the consequences for "the enemy" prevails.

Petitioners tell this Court that there were "*only four*" acts or threats of violence in this case. *(See* Scheidler Rep. Br. at 3 n.1 (emphasis in original); OR Pet. for Cert. at 4.) The only conscientious retort to such a contemptuous disregard for the effects of "only four" acts of violence on their victims is to remind Petitioners and the Court that convicted clinic bomber Eric Rudolph committed "only four" acts of violence, exploding "only four" bombs, but killing or injuring dozens, including *amica* Emily Lyons.

These "acts or threats of violence" are the type of conduct that the Hobbs Act was intended to deter and for which Respondents seek to hold Petitioners accountable.

Antiabortion terrorist Rudolph did indeed "HAVE A BLAST" as Petitioner Scheidler suggested. The Birmingham bombing for which he was sentenced to two consecutive life terms on Emily Lyons' birthday, April 11, 2005, capped his trilogy of terror directed against internationalism, reproductive health service providers, and lesbians. Here is a description of Rudolph's "only four acts or threats of violence":

- During the 1996 Olympics in Atlanta where an estimated 50-70,000 milled about, a caller dialed 911 from a pay phone and reported, "There's a bomb in Centennial Park. You have 30 minutes." Twenty minutes later, the military-style backpack placed under a park bench exploded. The blast, set by a self-proclaimed protector of children, injured 111 people and killed Alice Hawthorne, leaving her daughter motherless. *See* Add Seymour, Jr., "Bomber Sentencing Monday in Atlanta: Olympic blast victims will face Rudolph," Atlanta *Journal-Constitution* (Aug. 21, 2005) at 1D. Her husband celebrated what would have been his 18th wedding anniversary observing Rudolph's sentencing for the crime. "Rudolph Sentenced to Life in Atlanta Bombings," *Chicago Free Press* (Aug. 24, 2005), at 7.

- Rudolph's bomb at Atlanta's Sandy Springs Professional Building on January 16, 1997 used 3 1/2 pounds of 1 1/2" long flooring nails, 100' of

twisted galvanized wire, and dynamite. The Sandy Springs Professional Building housed the Northside Family Planning Clinic. Several people were injured, including police officers. *See* U.S. Department of Justice Press Release, "Eric Rudolph Charged In Olympic Park Bombing" (Oct. 14, 1998), *available at* www.usdoj.gov/opa/pr/1998/October/477crm.htm. The bomb that caused the injuries was an anti-personnel device, timed for a second explosion to harm the rescuers. *Id.* Rudolph was sentenced August 22, 2005.

- The Otherside Lounge, an Atlanta lesbian bar, was bombed February 21, 1997. That bomb used 6 ½ pounds of 2" long nails, twisted galvanized wire, and between 30 and 50 half-pound sticks of dynamite. *Id.* Rudolph was sentenced for the crime August 22, 2005.

- At approximately 7:30 a.m., on January 29, 1998, a bomb was detonated at the New Woman All Woman clinic in Birmingham, Alabama. This bomb, which contained five pounds of dynamite, and hundreds of nails, killed off-duty police officer Robert "Sande" Sanderson and maimed *amica* Emily Lyons. *See* "To Hell and Back, *supra*; Jay Reeves, "An unrepentant Rudolph gets life in prison for deadly bombing at abortion clinic," The Associated Press Online (July 18, 2005).

Rudolph clearly esteems himself a holy warrior, a good man who will be hailed as a hero by later

generations. He told the federal judge in Birmingham who sentenced him:

> I will be vindicated – my actions that overcast day in January 1998 will be vindicated. As I go to a prison cell for a lifetime I know that I have fought a good fight. I have finished my course. I have kept the faith.

"Olympic bomber gets two life sentences for attack," *Agence France Presse – English* (Jul. 18, 2005). Similarly, he wrote his mother:

> Perhaps I should have found a peaceful outlet for my opposition to the government in Washington: maybe I should have been a lawyer and fought [for] decency in the face of this rotten system; perhaps I could have taken up teaching and sought to inculcate a healthy outlook in a decidedly unhealthy society. But ... I resorted to force to have my voice heard. However wrongheaded my tactical decision to resort to violence may have been, morally speaking my actions were justified.

Blake Morrison, "Special report: Eric Rudolph writes home," *USA Today* (July 7, 2005) at 1A.

> Rudolph views himself as a holy warrior, a good

man done in by a corrupt system of justice,[9] rather than a terrorist. Petitioners likewise have recast themselves in this Court as peace-loving civil rights activists, rather than the racketeers a jury found them to be based on their "only four" acts or threats of violence. Like Rudolph, Petitioners had a choice: work within the system for change or engage in "acts or threats of violence." According to a federal jury, they chose the latter. It is entirely fair to treat them accordingly, no matter how morally justified they believe themselves to be.

CONCLUSION

There is no free speech right to do what Petitioners did. There is no free speech right to do what Eric Robert Rudolph did. There certainly is no excuse in morality. This Court should recognize the implications of Petitioners' argument that "only four" acts of violence – which could be Rudolph's four bombings – somehow are trivialities unworthy of a close examination by the Court. PLAN, Scheidler, and Operation Rescue do not want this

---

[9] In another letter to his mother, Rudolph evinces an appreciation of Herman Melville but a void of self-awareness: "I just finished reading *Billy Budd* by Melville. It's a story about a good man sacrificed on the altar of military-legal expediency. It makes a powerful statement at the end about the relativity of history, and just who ends up being the good guy or bad guy depends on who gets to write the story." Morrison, *supra*. He questions the government's "moral authority to judge a man for murder," Morrison, *supra*, and sanctimoniously offered to "forgive" workers at clinics, workers like Emily Lyons whom he maimed, Sande Sanderson whom he killed. *See* Eric Robert Rudolph, "Statement of Eric Robert Rudolph," *reprinted in* The Birmingham *News* (Apr. 14, 2005) at 9A.

Court to peer under the "free speech" cloak they use to hide their naked aggression toward people seeking medical treatment and people providing it. But this Court must look with a discerning eye past the veil of obfuscation. This Court should make clear that, if anthrax is sent in the mail, the letter accompanying it is not mere speech just because it expresses an opinion. This principle should be no less true of bombs, blockades, and blitzes.

Respectfully submitted,

PAMELA L. SUMNERS*
528 N. Humphrey
Oak Park, IL 60602
(312) 213-1725
*Counsel of Record

Supreme Court, U.S.
FILED
OCT 21 2005
OFFICE OF THE CLERK

Nos. 04-1244 and 04-1352

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*

Petitioners,

and

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* ABNER J. MIKVA AND WILLIAM A. NORRIS IN SUPPORT OF RESPONDENTS

MOLLY S. BOAST
(Counsel of Record)
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
Telephone: (212) 909-6000

Counsel for Amici Curiae Abner J. Mikva and William A. Norris

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE SEVENTH CIRCUIT AND THE SUPREME COURT HAVE BEEN APPROPRIATELY RELUCTANT TO BE THE FIRST TO ADDRESS THE PHYSICAL VIOLENCE ISSUE 3

A. No court in this litigation has addressed whether acts or threats of physical violence could support an injunction against Petitioners 3

B. The appellate courts would benefit from the district court's initial review of the outstanding question, and may never need to address it. 5

II. ALLOWING TRIAL AND APPELLATE COURTS TO IDENTIFY AND RESOLVE REMAINING OPEN ISSUES PROMOTES EFFICIENT ADMINISTRATION OF JUSTICE. 7

A. The writ of certiorari generally establishes the questions for Supreme Court decision, and issues omitted are typically left to the trial and appellate courts. 7

B. The Court of Appeals followed established procedure in this case. 8

1. The Court of Appeals correctly identified the outstanding issue. 8

2. The Court of Appeals' remand to the district court did not violate the Supreme Court's mandate to vacate the original injunction. 9

C. The approach advanced by Petitioners would waste scarce judicial resources and obscure important issues in cases before this Court. 10

CONCLUSION 13

TABLE OF AUTHORITIES

FEDERAL CASES

Glover v. United States,
531 U.S. 198 (2001) 7, 8

In re Sanford Fork & Tool Co.,
160 U.S. 247 (1895) 7, 8

Lytle v. Household Mfg., Inc.,
494 U.S.545 (1990) 6

Matsushita Elec. Indus. Co., Ltd. v. Epstein,
516 U.S. 367 (1996) 12

National Organization for Women, Inc. v. Scheidler,
396 F.3d 807 (7th Cir. 2005) ..... *passim*

National Organization for Women, Inc. v. Scheidler,
510 U.S. 249 (1994) 3

Peralta v. Heights Medical Center, Inc.,
485 U.S. 80 (1988) 12

Quern v. Jordan,
440 U.S. 332 (1979) 7

Scheidler v. National Organization for Women, Inc.,
537 U.S. 393 (2003) 4, 8, 9

Sprague v. Ticonic National Bank,
307 U.S. 161 (1939) 7

Toyota Motor Mfg., KY., Inc. v. Williams,
534 U.S. 184 (2002) 7

Yee v. City of Escondido,
503 U.S. 519 (1992) 6, 7, 11, 12

FEDERAL STATUTES

18 U.S.C. § 1961 *et seq.* ..... *passim*

18 U.S.C. § 1951 ..... *passim*

SUPREME COURT RULES

Sup. Ct. R. 14.1(a). 7

INTEREST OF *AMICI CURIAE*[1]

Abner J. Mikva[2] is currently Schwartz Lecturer and Senior Director of the Mandel Legal Aid Clinic at the University of Chicago Law School. Having served in the federal judiciary as well as on the House Judiciary Committee while in Congress, Mr. Mikva has extensive knowledge concerning judicial procedures.

William A. Norris is Senior Counsel at Akin Gump Strauss Hauer & Feld LLP. Mr. Norris's career as a federal court of appeals judge and as an appellate litigator makes his an educated voice on court procedure.

Squarely at issue in this case is the power of courts of appeals to interpret Supreme Court mandates and remand for resolution of remaining matters. Petitioners' argument that the Supreme Court in *Scheidler II* invalidated trial court holdings that were outside the questions presented, and never even mentioned by the Court, puts this essential judicial role in jeopardy. *Amici curiae* believe that deference to traditional judicial practice and considerations of economy should lead the Court to affirm the Court of Appeals' decision to remand the case.

---

[1] *Amici curiae* state that this brief has not been authored in whole or in part by counsel for a party in this case, and disclose that the law firm of Debevoise & Plimpton LLP made a contribution in kind to the printing, preparation and submission of this brief. Written consents of the parties to the filing of amicus briefs have been filed with the clerk.

[2] The current affiliations of Mr. Mikva and Mr. Norris are provided here for identification purposes only, and are not intended to convey the views of their affiliated institutions on the questions at issue.

SUMMARY OF ARGUMENT

No court in the nineteen-year history of this litigation has addressed whether acts of physical violence not premised on extortion or robbery could support an injunction under *RICO*. When Petitioners presented this Court with other questions in this case two years ago, the Court was appropriately disinclined to reach beyond those questions to address the physical violence issue. Upon remand, the Seventh Circuit Court of Appeals recognized the need to resolve this undecided question and referred it to the district court.

This Court's precedents and notions of judicial economy support allowing the Seventh Circuit's remand to the district court to follow its course. This Court has repeatedly emphasized that it prefers to rule only on the questions presented, leaving the identification and resolution of remaining issues to the courts of appeals. Petitioners' argument threatens to undermine these long-established institutional roles, wasting scarce judicial resources and confusing the issues before this Court. The Seventh Circuit's decision to remand will efficiently resolve the unaddressed question, and should be affirmed.

ARGUMENT

I. THE SEVENTH CIRCUIT AND THE SUPREME COURT HAVE BEEN APPROPRIATELY RELUCTANT TO BE THE FIRST TO ADDRESS THE PHYSICAL VIOLENCE ISSUE.

This case has the potential to place the Supreme Court in the position of analyzing facts in the first instance to determine an issue "which never before in this litigation has been the subject of full briefing or judicial consideration." *National Organization for Women, Inc. v. Scheidler*, 396 F.3d 807, 810 (7th Cir. 2005) ("*National Organization for Women*"). The Court of Appeals, relying on this Court's silence on the physical violence issue in the last venture of this case before the Court, recognized that such a task better suits the district court.

A. No court in this litigation has addressed whether acts or threats of physical violence could support an injunction against Petitioners.

In the first of this case's three ventures before the Supreme Court, the Court held that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, contains no "economic motive" requirement, and reversed the Seventh Circuit Court of Appeals, which had affirmed the district court's dismissal of the complaint. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) ("*Scheidler I*"). On remand to the district court, the jury found 117 RICO predicate acts based on extortion, and four predicate acts based on acts or threats of physical violence not premised on robbery or extortion.

Following additional hearings, the trial court enjoined the Petitioners from certain behavior, including acts or threats of violence. On appeal, the Seventh Circuit held that 21 of the 117 extortion-based violations were sufficient to support the injunction. The Court of Appeals recognized but did not disturb the jury's finding that four acts or threats of physical violence served as a basis for RICO liability.

Two years ago, this case arrived before the Supreme Court for the second time. The Court invalidated the 21 predicate acts found by the Court of Appeals to sustain the jury verdict, and vacated the injunction, because the Court determined that Petitioners had not committed extortion within the meaning of the Hobbs Act. *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*"). The Supreme Court further ruled that "[b]ecause petitioners did not obtain or attempt to obtain respondents' property," the remainder of the 117 extortion-based predicate acts were also "fatally flawed." *Id.* at 410. No Petitioner in that appeal challenged the jury's determination that four of the predicate acts constituting the basis for RICO liability were acts or threats of physical violence. Even after Respondents noted the four physical violence acts in their Brief in Opposition, Petitioners did not take the opportunity to ask this Court whether physical violence unconnected to robbery or extortion could support the injunction. In fact, the Petitioners did not even discuss the physical violence issue in their merits briefs. Not having been asked the question, this Court did not provide an answer.

Just as no court addressed this question before *Scheidler II*, neither has any court answered it since the Court's 2003 remand to the Seventh Circuit for further proceedings. The Seventh Circuit identified the unasked and unanswered question, and declined to

read an answer into the Court's silence on the matter. Following long-established practice that vests trial courts with responsibility to address questions prior to appellate review, the Seventh Circuit remanded for a determination whether the four physical violence acts are sufficient to support an injunction. In response to a petition for rehearing *en banc*, the Seventh Circuit observed that "the [Supreme] Court had nothing at all to say about" the topic. *National Organization for Women*, 396 F.3d at 812. "[J]udicial economy and restraint" indicated to the Seventh Circuit that it should not take up the question either, until the district court had an opportunity to speak. *Id.*

This case's current and third foray before the Supreme Court invites the Court to consider "whether a different injunction, tailored to the [four remaining] violations found, would be appropriate." *Id.* As at the time of the *Scheidler II* opinion, this question is better addressed first by a district court.

B. The appellate courts would benefit from the district court's initial review of the outstanding question, and may never need to address it.

The district court is the appropriate forum for resolution of the issue untouched by the Supreme Court for the simple reason of judicial economy. The Supreme Court has hesitated to address and resolve issues in the first instance as a means of avoiding unnecessary rulings, and the district courts have available procedures to support their role as first reviewers. The trial courts are well-positioned to make determinations of fact: they are the first courts litigants approach, they are versed in distilling multifaceted and sometimes unwieldy litigations into questions of law and fact for resolution, and they have

available established processes for expedient initial review.

Petitioners request that this Court consider whether the four physical violence acts can support the district court's injunction without the benefit of the Court's usual foundation of full litigation for considering an issue. Not only does this Court lack the support available to a district court, but also in taking on this role, the Court would deprive itself of fully briefed and developed arguments, and district and appellate court analysis and opinions. "Applying [the Supreme Court's] analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (quoting *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990) (internal quotations omitted)).

Allowing the district court to rule also may extricate the Supreme Court from any cause to interpret the Hobbs Act, a statute reaching far beyond this case. The Seventh Circuit emphasized that the district court might dispose of the case on the facts:

> If and only if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury, that court will have to confront a more complex legal issue, namely, whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO.

National Organization for Women, 396 F.3d at 812.

Just as "there is no need for [the Seventh Circuit] to decide a question that may not even be pertinent to the case once the district court has looked at the points

that remain on remand," *id.*, so should the Supreme Court decline to provide the initial review.

II. ALLOWING TRIAL AND APPELLATE COURTS TO IDENTIFY AND RESOLVE REMAINING OPEN ISSUES PROMOTES EFFICIENT ADMINISTRATION OF JUSTICE.

A. The writ of certiorari generally establishes the questions for Supreme Court decision, and issues omitted are typically left to the trial and appellate courts.

Rule 14.1(a) of the Supreme Court establishes that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). Although Rule 14.1 is prudential in nature, the Court disregards it only in the most exceptional cases, "where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration." *Yee*, 503 U.S. at 535. Consistent with that rule, the Supreme Court identifies specific issues for review in its grant of certiorari.

In resolving an appeal, the Court typically declines to decide issues outside the questions identified for resolution in the order granting certiorari. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 202–03 (2002); *Glover v. United States*, 531 U.S. 198, 205 (2001). Rather, any issues necessary to the final resolution of the case, but outside the writ, are typically left for the circuit court, on remand, to consider and decide. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 348 n.18 (1979); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939); *In re Sanford Fork & Tool Co.*,

160 U.S. 247, 256 (1895). The Court implicitly anticipates that the appellate court will take up these issues.

On remand, the circuit court must determine whether any issues outside the grant of certiorari require resolution, and propose means of bringing those issues to a close. "Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance." *Glover*, 531 U.S. at 205.

B. The Court of Appeals followed established procedure in this case.

Following remand of *Scheidler II* from the Supreme Court, the Court of Appeals scrutinized the Supreme Court's grant of certiorari, found one outstanding issue, and concluded that, "[g]iven the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari . . . we will not presume that in this case it went beyond the scope of its grant of certiorari." *National Organization for Women*, 396 F.3d at 810. The Court of Appeals recognized that "[t]he district court is in the best position to decide what to do in these circumstances, given its extensive familiarity with the voluminous record in this case," *id.* at 812, and remanded to the district court for the resolution of the outstanding issue.

1. *The Court of Appeals correctly identified the outstanding issue.*

The Supreme Court granted certiorari in *Scheidler II* to answer "whether petitioners committed extortion within the meaning of the Hobbs Act" and

"whether respondents, as private litigants, may obtain injunctive relief in a civil action pursuant to . . . [RICO]." 537 U.S. at 397. Following this Court's determination that Petitioners had not committed extortion within the meaning of the Hobbs Act, none of the 117 extortion-based acts remained to support the injunction. Having disposed of all predicate acts encompassed by the grant of certiorari, the Court was not obliged to address its second question. *Id.* at 411.

The Supreme Court's opinion in *Scheidler II* made no mention of the four predicate acts not based on extortion. The grounds that the Court invoked for invalidating these extortion-based acts do not necessarily apply to the physical violence acts. The Court of Appeals declined to interpret the Court's silence as holding those four acts insufficient to support the district court's injunction. Such a conclusion on the part of the Court of Appeals would have "require[d] that we find both that the Court went beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion." *National Organization for Women*, 396 F.3d at 811.

The Court of Appeals properly articulated the remaining issue in the case as whether the four outstanding predicate acts alone could support the district court's injunction and, if so, whether the Hobbs Act outlaws "physical violence" apart from extortion and robbery. *Id.*

2. *The Court of Appeals' remand to the district court did not violate the Supreme Court's mandate to vacate the original injunction.*

The Court of Appeals' identification of a remaining issue warranting trial court consideration did not violate the Supreme Court's mandate to vacate

the original injunction. The Court of Appeals fully complied with the Supreme Court mandate by instructing the district court to dissolve the nationwide injunction and consider whether *"some form* of injunctive relief would be justified based on the four remaining predicate acts found by the jury." *National Organization for Women,* 396 F.3d at 812 (emphasis added).

C. The approach advanced by Petitioners would waste scarce judicial resources and obscure important issues in cases before this Court.

Petitioners' argument that the Court of Appeals erred when it remanded the case to the trial court to consider unresolved issues strikes at the heart of well-entrenched judicial procedures. Petitioners assert that because this Court did not explicitly direct the Court of Appeals to consider the remaining four acts of physical violence, this Court implicitly included them in its disposal of the extortion-based acts. This argument gets it exactly backwards. As the Court of Appeals understood:

> [W]e will not presume that in this case [the Supreme Court] went beyond the scope of its grant of certiorari . . . to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction.

National Organization for Women, 396 F.3d at 810-11.

Petitioners' vision of how this Court should function would yield an unmanageable appellate process. First, respondents would have to raise on appeal all arguments raised before the trial court to preserve issues for possible remand. If they did not do so, and if the Court's remand did not explicitly state

that specific issues remained open, then under Petitioners' theory further consideration of all issues would be automatically terminated.

In *Yee*, the Court recognized that forcing respondents to raise every possible alternative ground to support their position would impose an unsupportable burden:

> [T]he respondent would face the formidable task of opposing certiorari on every issue the Court might conceivably find present in the case. By forcing the petitioner to choose his questions at the outset, Rule 14.1(a) relieves the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions.

503 U.S. at 536.

Moreover, the briefing and argument spent on alternative grounds would muddle the Court's inquiry and deflect attention from the questions presented. Decades of practice have endorsed this Court's limited method of review, and the courts of appeals' resolution of open issues, as the most efficient allocation of judicial workload. As this Court noted in *Yee*:

> Were we routinely to entertain questions not presented in the petition for certiorari, much of this efficiency would vanish, as parties who feared an inability to prevail on the question presented would be encouraged to fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted. Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important,

> thus enabling us to make efficient use of our resources.

Id. at 536.

By encouraging proliferation of the issues raised before the Court, Petitioners' approach would turn Supreme Court review into something similar to that conducted by a trial court, and in sharp contrast to the carefully focused review the Court undertakes now. This Court has historically used its scarce resources to resolve the most important questions of law, and has found the courts of appeals fully capable of addressing remaining issues. It is for these reasons that when respondents raise alternative grounds, the Court generally refuses to consider them. *See, e.g., Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988).

Proliferating issues would simply supply alternative bases for the Court's holdings, which then would have to be weeded out by the courts below. Although it is unfortunate that final resolution may be delayed once again, that is no reason to depart from established practice reflecting the wisdom of avoiding overly expansive appellate review.

The second unwelcome change the Petitioners' argument would induce is a drastic increase in motions for clarification to this Court. Uncertain whether the Court had implicitly disposed of trial court holdings in its rulings, parties would repeatedly return to the Court seeking clarification of which issues remained open on remand. The increase in motions for clarification would cost the Court and the litigants much unnecessary time and expense. The Court generally rules only on questions presented partly to avoid this inefficiency, and to minimize the

confusion to the parties that Petitioners' theory would provoke.

Although claiming simply to interpret this Court's mandate in *Scheidler II*, accepting Petitioners' argument would turn traditional judicial procedure on its head. This Court has made clear that ruling narrowly on questions presented, with resolution of outstanding issues left to the courts of appeals, is the most orderly and efficient distribution of judicial business. The Court of Appeals complied with this method when it properly remanded the case for the trial court to consider the four acts of physical violence.

CONCLUSION

For the foregoing reasons, Amici encourage the Court to rule in a manner that will effectuate the Court of Appeals' remand of this case to the District Court and to decline to rule on the second and third questions presented in this appeal.

Respectfully submitted,

MOLLY S. BOAST
(Counsel of Record)
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
Telephone: (212) 909-6000

Counsel for Amici Curiae Abner J. Mikva and William A. Norris

October 21, 2005

Supreme Court, U.S.
FILED
OCT 21 2005
OFFICE OF THE CLERK

Nos. 04-1244, 04-1352

In the

Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURRAY, AND THE PRO-LIFE ACTION NETWORK, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* NARAL PRO-CHOICE AMERICA, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICANS FOR DEMOCRATIC ACTION, INC., BLACK WOMEN'S HEALTH IMPERATIVE, CENTER FOR REPRODUCTIVE RIGHTS, CENTER FOR WOMEN POLICY STUDIES, HADASSAH, WZOA, INC., LEGAL MOMENTUM, NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL COUNCIL OF JEWISH WOMEN, INC., NATIONAL HEALTH LAW PROGRAM, NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL WOMEN'S LAW CENTER, WOMEN EMPLOYED, WOMEN'S LAW PROJECT AND WOODHULL FREEDOM FOUNDATION IN SUPPORT OF RESPONDENTS

BLAKE M. CORNISH
EDERLINA Y. CO
NARAL PRO-CHOICE AMERICA
1156 15 Street, NW
Suite 700
Washington, D.C. 2005
(202) 973-3000

MARIA T. VULLO
Counsel of Record
WILLIAM J. TAYLOR, JR.
BETH S. FRANK
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Counsel for Amici Curiae

OCTOBER 21, 2005

TABLE OF CONTENTS

Page

INTERESTS OF *AMICI CURIAE* 1

STATEMENT 1

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. THE SEVENTH CIRCUIT'S DECISION POSES NO THREAT TO FIRST AMENDMENT FREEDOMS 9

A. First Amendment Questions Are Not Before This Court 9

B. Violence and Threats of Violence Are Not Protected Forms of Expression 10

C. The Seventh Circuit's Decision Is Not "Irreconcilable with the Long History of Social Protest in This Country" 13

II. INJUNCTIVE RELIEF IS ESSENTIAL IN THIS CASE TO ENSURE THE SAFETY OF MEDICAL PROFESSIONALS 15

A. A Permanent Injunction Is Necessary Given the Nature of the Acts and Threats of Violence Committed by Petitioners 15

B. A Nationwide Injunction Is the Only Sufficient Remedy 18

CONCLUSION 20

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Bresgal v. *Brock*, 843 F.2d 1163 (9th Cir. 1987) 19

Madsen v. *Women's Health Center, Inc.*, 512 U.S. 753 (1994)..... 11-13, 19

Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U.S. 287 (1941).....11

NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982)..... 5-6, 11-12

NLRB v. *Express Publishing Co.*, 312 U.S. 426 (1941) 16

National Organization for Women, Inc. v. *Scheidler*, 510 U.S. 249 (1994) ("*Scheidler I*")..... 2, 9-10, 13

R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992).....8

Scheidler v. *Delaware Women's Health Organization, Inc.*, 513 U.S. 1058 (1994) (mem.).....2

Scheidler v. *National Organization for Women, Inc.*, 535 U.S. 1016 (2002) (mem.) 7

Scheidler v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*")..... *passim*

Schenck v. *Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997)..... 11-12, 19

United States v. *Carson*, 52 F.3d 1173 (2d Cir. 1995) 19

United States v. *Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) 18-19

United States v. *U.S. Gypsum Co.*, 340 U.S. 76 (1950).....16

Virginia v. *Black*, 538 U.S. 343 (2003) 8, 10

Watts v. *United States*, 394 U.S. 705 (1969) 10

Wisconsin v. *Mitchell*, 508 U.S. 476 (1993)..... 7-8, 10

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969).....16

STATUTES

Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248.....16

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) 2

MISCELLANEOUS

Petition for a Writ of Certiorari of Joseph Scheidler, et al., *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*") (No. 01-1118), 2002 WL 32101166.....6

Petition for Writ of Certiorari of Operation Rescue, *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*") (No. 01-1119), 2002 WL 32101172.....6

Martin Luther King, Jr., *The Words of Martin Luther King, Jr.* (selected by Coretta Scott King, 1996) 13

INTERESTS OF *AMICI CURIAE*

NARAL Pro-Choice America (and its co-*amici)* are organizations committed to promoting civil rights. All share a strong interest in protecting the guarantees of the First Amendment of the United States Constitution and the right to peaceful, nonviolent protest. Indeed, most civil rights were secured through exercise of these First Amendment rights to advance and protect the freedoms to which their organizations are committed. At the same time, all the *amici* want to ensure that forcible, threatening and violent conduct is not confused with constitutionally-protected peaceful protest, lest the misdeeds of petitioners and others like them taint and ultimately put an end to *amici*'s and others' efforts to effect social change through legitimate, constitutionally-protected means.[1] (Descriptions of each of the *amici* are provided in the Appendix hereto.)

STATEMENT

Amici note the following facts particularly relevant to the legal discussion in this brief.

This case was brought on behalf of full-service health clinics and their patients whose interstate business operations repeatedly have been disrupted by petitioners' nationwide campaign of violence and terror. The evidence presented to the courts below demonstrated beyond doubt that petitioners unlawfully conspired to force the closing of clinics that perform abortions and that they did so through a pattern of illegal

---

[1] All parties in this matter have consented to the filing of this *amici curiae* brief, as evidenced by the letters of consent filed with the Clerk. *Amici* are not related in any way to any party in this case, and no party or its counsel has authored any part of this brief. No person or entity other than *amici* and their counsel has made any monetary contribution to the preparation of this brief.

racketeering activity that included acts and threats of violence in violation of the Hobbs Act. Respondents have suffered substantial injury as a result of petitioners' unlawful conduct, which unquestionably has affected respondents' ability to provide medical care to their patients throughout the country, and which, as both lower courts have found, is fully redressable only through injunctive relief. In addition, by finding petitioners liable for four "acts or threats of physical violence" under the Hobbs Act, the jury necessarily found, as both the district court and the Seventh Circuit expressly have held, that petitioners' conduct is not protected speech under the First Amendment. These First Amendment rulings are not before this Court.[2]

The evidence presented at trial demonstrated that petitioners operated and managed their RICO enterprise, the Pro-Life Action Network ("PLAN"), through force, threats and violence, to prevent respondents from exercising their rights to access constitutionally-protected medical procedures. Naming themselves the "pro-life Mafia," petitioners participated in a long-standing pattern of engaging in, authorizing, and/or ratifying wrongful acts and threats of physical violence as a means to put an end to safe, legal abortion throughout the country. Their wrongful conduct included:

- In Los Angeles, California, PLAN protesters physically assaulted a patient who was seeking medical care at a health clinic as a follow-up to her

---

[2] Prior to trial, in *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) ("*Scheidler I*"), this Court reversed the initial dismissal of the complaint in this case, finding that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), does not have an "economic motive" requirement. Also prior to trial, but after the decision in *Scheidler I*, this Court denied petitioners' request for certiorari on, *inter alia*, First Amendment issues. *Scheidler* v. *Delaware Women's Health Org., Inc.*, 513 U.S. 1058 (1994) (mem.).

ovarian surgery. She testified: "All of a sudden, a crowd of people came running from both sides of the building towards the parking lot, towards us . . . somebody grabbed me by the back of my hair, and I fell up against the car. Then I just saw all of these people and they were grabbing their arms and grabbing at me. . . . Then I felt myself going down, and I got scared, real scared." One protester hit her over the head with a "big" picket sign. The attack forced open this patient's surgical incision, causing her to bleed from the abdomen, and she had to be rushed to the hospital. (Appendix to Petition for a Writ of Certiorari of Petitioners Joseph Scheidler, Andrew Scholberg, Timothy Murphy and the Pro-Life Action League, Inc. ("Sch. App.") 143a-144a.)

- In Chico, California, hundreds of PLAN members physically smashed a clinic administrator and two clinic escorts up against a clinic's entrance doors. When the clinic administrator told the protestors that she was scared and was being crushed, she heard protestors shout: "Don't pay any attention to them. They're murderers. They're baby killers. Whatever happens to them is God's will." The glass entrance to the clinic was damaged, and the clinic administrator received bruises on her legs and arms. (*Id.* at 143a.)

- In Pensacola, Delaware, while petitioner Joseph Scheidler stood outside with a bullhorn, a number of PLAN members burst into a reproductive health clinic and engaged in several acts of violence. They pushed the clinic administrator down the stairs, causing her severe disk damage; as a result, the administrator had to wear a neck brace and go to physical therapy for several months. In addition, one of the invaders slammed a National Organization for Women ("NOW") escort up against

the wall, causing serious injuries. The PLAN members also destroyed the clinic's medical equipment. (Trial Transcript ("Tr.") 1469-72, 4022.)

- In Washington, D.C., busloads of PLAN members rushed the doors of a clinic, pressing the bodies of clinic staff members and volunteers against the clinic entrance as they screamed they were being crushed. As one witness testified, "[S]everal of us started yelling as loud as we could, 'please stop pushing. We're going to get hurt.'" (Sch. App. 143a.)

- In Milwaukee, Wisconsin, PLAN members repeatedly banged on a patient's car as she entered a health clinic parking lot and grabbed at her arms and legs as she attempted to enter the clinic. (*Id.*)

Numerous witnesses testified to the impact that this violence had upon them. A clinic volunteer recounted, "They were . . . shoving and elbowing and smashing. I mean, they were right within less than an inch of us. . . . [Y]ou know, you start sweating. You're scared. Your heart's pounding." A patient testified, "I was hysterical. I was afraid. I thought they were going to kill me." (Sch. App. 144a-145a.) A clinic administrator explained, "I was concerned about the injury to our staff and to our patients, not only the physical injury of the building itself and the equipment but also the emotional injury and distress to our patients and to our staff, who were terrified." (*Id.* at 143a-144a.)

At the close of trial, after the presentation of this evidence and much more, the district court instructed the jury on the relevant legal issues. Regarding the First Amendment, the district court made clear to the jury that "the right to engage in peaceful protest" is not "an issue in this lawsuit," and that "[t]he parties agree that peaceful picketing, leafletting, and

participating in the legislative process are activities protected by the First Amendment." (Sch. App. 178a.) Then, in complete accordance with this Court's precedents, the district court specifically instructed the jury that while "[m]ere advocacy of the use of force and violence may not be the basis for finding defendants liable for having made the speech or authored the writing,"

> [t]hreats to patients, owners or operators of clinics, clinic staff including doctors, and those assisting patients, owners, operators, or clinics or staff are not protected by the First Amendment. Physical attacks on patients, owners, operators of clinics, or clinic staff are not protected by the First Amendment. Destruction of property is not protected by the First Amendment.

(*Id.* at 187a-188a.) In addition, guided by this Court's decision in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), the district court emphasized that petitioners would not be liable through "guilt by association," instructing the jury that "[l]iability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence" and that "[i]n order to find the defendants liable, you must conclude that the enterprise or those acting on behalf of the enterprise directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives." (*Id.* at 185a.)

The jury returned a unanimous verdict, finding petitioners responsible for operating PLAN through a pattern of 121 RICO predicate acts, including 4 acts or threats of physical violence. (Sch. App. 190a-195a.) The district court then independently found that petitioners' crimes had continued unabated and that injunctive relief was both necessary and fully consistent with the First Amendment. As the district court noted, "[t]he injunction restrains specific behavior of

[petitioners] that the courts have held are not protected: obstructing or interfering with the access to a reproductive health facility, trespassing, damaging property, and using violence or threats of violence. . . . The injunction still leaves open many avenues for [petitioners] to express their anti-abortion beliefs . . . such as peaceful picketing, public speeches, pamphleting, praying, or sidewalk counseling." (*Id.* at 169a (citations omitted).)

In affirming the jury verdict and injunction, the Seventh Circuit similarly held that there were no First Amendment problems in this case, noting that "the record is replete with evidence of instances in which [petitioners'] conduct crossed the line from protected speech into illegal acts, including acts of violence, and it is equally clear that the First Amendment does not protect such acts." (Sch. App. 44a.) The court of appeals emphasized that "the district court adequately ensured that the jury's verdict was not based on activities protected by the First Amendment, and that the remedies it ordered also respected the line between protected expression and unprotected conduct." (*Id.*) Furthermore, the Seventh Circuit held that the district court's *Claiborne Hardware* instruction—the only First Amendment jury instruction challenged by petitioners on appeal—fully complied with the law. (*Id.* at 49a-51a.)

In *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*"), this Court reversed on the ground that petitioners had not committed extortion under the Hobbs Act. The *Scheidler II* Court limited its decision to the single question of extortion. As here (and as in *Scheidler I*), no First Amendment issues or jury instruction challenges were before the Court.[3] After receiving the *Scheidler II* mandate, the

---

[3] Petitioners sought review on First Amendment issues in *Scheidler II*, *see* Petition for a Writ of Certiorari of Joseph Scheidler, et al., *Scheidler II*, 537 U.S. 393 (No. 01-1118), 2002 WL 32101166, at *i; Petition for Writ of Certiorari of Operation Rescue, *Scheidler II*, 537 U.S. 393 (No. 01-

Seventh Circuit remanded to the district court to determine one remaining question: whether the petitioners' four predicate acts involving acts or threats of physical violence are sufficient to support an injunction. It is this limited ruling by the Seventh Circuit that is now on review.

In particular, this Court has granted certiorari review on three questions: (i) whether the court of appeals violated this Court's mandate in *Scheidler II*; (ii) whether the Hobbs Act prohibits acts and threats of physical violence that are not connected to robbery or extortion; and (iii) whether injunctive relief is available in a private civil action under RICO. Although no First Amendment question is at issue before this Court, petitioners and their *amici* nevertheless suggest that an injunction prohibiting them from repeating concededly illegal acts—threats of violence and violence—somehow would transgress the First Amendment. Given this suggestion, *amici* explain below that First Amendment freedoms are in no way hampered by this case. For the reasons discussed below, and those in respondents' brief, the Court should affirm.

SUMMARY OF ARGUMENT

This case is about the scope of the Hobbs Act and the remedies available under RICO. It is about petitioners' criminal acts and threats of violence. This case is neither about abortion nor is it about peaceful social protest protected by the First Amendment.

1119), 2002 WL 32101172, at *i, but the Court limited its grant of certiorari to (i) the meaning of "extortion" under the Hobbs Act and (ii) whether private injunction relief is available under RICO, *see Scheidler* v. *National Org. for Women, Inc.*, 535 U.S. 1016 (2002) (mem.); *Scheidler II*, 537 U.S. at 397. The Court did not reach the RICO injunction question. *See id.*

As this Court has long recognized, "[t]he First Amendment does not protect violence." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (quoting *Claiborne Hardware*, 458 U.S. at 916) (internal quotation marks omitted) (noting that physical assaults are not protected by the First Amendment). This Court also has made clear that "[t]hreats of violence are outside the First Amendment." *Virginia* v. *Black*, 538 U.S. 343, 359 (2003) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)) (internal quotation marks omitted). Indeed, as the Seventh Circuit noted below, "[v]iolence in any form is the antithesis of reasoned discussion." (Sch. App. 55a.) Petitioners, found by the jury to have engaged in unlawful violent conduct—conduct that, in *Scheidler II*, both this Court and petitioners acknowledged was "criminal," *Scheidler II*, 537 U.S. at 404 & n.9—cannot cloak themselves in the mantle of nonviolent protest and expression protected by the First Amendment. Thus, holding petitioners accountable for their violent actions will not jeopardize this nation's long tradition of peaceful political protest. It will simply (and properly) direct those with passionate views "away from the use of threats and violence and back to 'all the peaceful means for gaining access to the mind.'" (Sch. App. 55a.)

The Seventh Circuit properly has made clear that the only injunction still available in this case is one tailored to redress the specific types of clearly illegal conduct that the jury found petitioners had engaged in the past. The injunction sought by respondents is necessary to save lives. Even as limited by the Seventh Circuit, an injunction remains essential to ensure the safety of medical professionals from petitioners' continuing nationwide pattern of unlawful, unprotected acts and threats of violence.

Accordingly, this Court should affirm the Seventh Circuit's decision and permit the district court to consider in the first instance "[t]he only remaining question" in this litigation: whether petitioners' acts and threats of physical violence are sufficient to support an injunction.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION POSES NO THREAT TO FIRST AMENDMENT FREEDOMS

Although the issue is not even before the Court, petitioners and their *amici* contend that the court of appeals' decision "threatens free speech" and "place[s] at risk a wide array of political and labor protestors." (Brief for Petitioners Joseph Scheidler, Andrew Scholberg, Timothy Murphy and the Pro-Life Action League, Inc. ("Sch. Br.") at 31; Brief of the Concerned Women for America As *Amicus Curiae* Supporting Petitioners at 2; *see* Brief *Amicus Curiae* of Consistent Life, et al. in Support of Petitioners ("CL Br.") at 1-30; Brief of *Amicus Curiae* Americans United for Life in Support of Petitioners at 1.) This alarmist argument has no merit. First Amendment interests are simply not at stake here.

A. First Amendment Questions Are Not Before This Court

As an initial matter, it should be noted that there are no First Amendment questions before this Court. The three questions presented in the petition—(i) whether the Seventh Circuit, on remand, overstepped the bounds of this Court's mandate in *Scheidler II*, (ii) whether the Hobbs Act may be read to proscribe acts or threats of violence that are unconnected to robbery or extortion, and (iii) whether private litigants may obtain equitable relief in a civil RICO action—concern only the scope of this Court's mandate and the proper interpretation of two federal statutes. Thus, just as in *Scheidler I* and *Scheidler II*, the Court should once again "decline to address" any of the First Amendment arguments raised by petitioners and their *amici* (arguments that plainly fail on the merits, as we discuss below) on the indisputable ground that they are outside the limited questions this Court has accepted for review. *See Scheidler I*, 510 U.S. at 262 n.6 ("declin[ing] to address the First

Amendment question argued" when "the question presented for review asked simply whether the Court should create an unwritten requirement limiting RICO to cases where either the enterprise or racketeering activity has an overriding economic motive"); *see also Scheidler II*, 537 U.S. at 397-411 (addressing only the meaning of "extortion" under the Hobbs Act and not addressing any First Amendment issues).

B. Violence and Threats of Violence Are Not Protected Forms of Expression

It is well-settled that acts and threats of violence are not protected by the First Amendment. *See, e.g.*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484 (1993) (noting that violent conduct and physical assaults are unprotected by the First Amendment); *Virginia* v. *Black*, 538 U.S. 343, 359 (2003) (noting that threats of violence are unprotected by the First Amendment); *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (same). And, despite what petitioners and their *amici* claim, unlawful acts and threats of violence—*not* protected speech or expressive conduct—are all that is at issue in this case.

In particular, as discussed above, the jury found petitioners liable for engaging in forcible, threatening, violent actions, *not* for peaceful demonstrations or nonviolent protests. *See supra* pp. 1-6. Likewise, the nationwide injunction entered by the district court prohibits only plainly illegal conduct, and it specifically underscores that it "does not prohibit peaceful picketing, speeches, or praying on public property, attempts to speak with patients and staff, handing out literature, or any other activity protected by the First Amendment." (Sch. App. 54a.) Furthermore, the Seventh Circuit's recent decision on remand makes clear that the only potential form of relief still available in this case is an injunction tailored "to redress the four acts of physical violence that the jury found had taken place and that

were not encompassed within th[is] Court's ruling" in *Scheidler II*. (*Id.* at 16a.)[4]

Petitioners and their *amici* point to this Court's decision in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), in an effort to create a free-speech issue here that simply does not exist. (*See* Sch. Br. at 31-32; CL Br. at 9-16.) *Claiborne Hardware* involved isolated acts of violence as to which there was no evidence of NAACP authorization or ratification. *See Claiborne Hardware*, 458 U.S. at 923-24. With respect to defendant Charles Evers, the Court made clear that Evers could have been found liable had the facts shown that he had "authorized, directed, or ratified specific tortious activity." *Id.* at 927. Evers was absolved of responsibility because of a lack of evidence, not because the First Amendment immunized force or violence. In addition, the Court cited with approval its prior decision in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941), which held that an injunction was proper in the context of pervasive violent conduct much like the conduct at issue here. *See Claiborne Hardware*, 458 U.S. at 923.[5] Thus, just like the rest of this Court's precedents,

---

[4] Under this Court's precedents, such an injunction clearly is not an unlawful prior restraint, as it would follow from the jury's findings of past illegal conduct. *See Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 764 n.2 (1994) (no prior restraint where injunction issued because of prior unlawful conduct); *Schenck* v. *Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 374 n.6 (1997) (rejecting argument that all injunctions are improper prior restraints where injunction prohibited conduct previously adjudicated and found unlawful).

[5] The Consistent Life *Amici* argue that *Milk Wagon Drivers* does not "continue[] to express a constitutionally viable principle after *Claiborne Hardware*" and attempt to rely on an *amicus* brief NOW filed in *Claiborne Hardware* to support this argument. (CL Br. at 13; *see id.* at 11-14.) This makes no sense. Regardless of whatever arguments NOW may have raised before this Court decided *Claiborne Hardware* (which we properly do not address here), the Court made clear in *Claiborne Hardware* that *Milk Wagon Drivers* is still good law. *See Claiborne*

Claiborne Hardware offers no First Amendment protection to acts and threats of violence, *see Claiborne Hardware*, 458 U.S. at 916 ("The First Amendment does not protect violence."); *id.* at 933 ("[V]iolent conduct is beyond the pale of constitutional protection."), and thus provides no support for petitioners' arguments.

Indeed, as noted above, the district court was guided by *Claiborne Hardware* throughout this litigation and gave instructions to the jury, which were upheld on appeal and not accepted for review by this Court, specifically to address the First Amendment. *See supra* pp. 4-6. The Seventh Circuit also considered and properly rejected the very same First Amendment arguments petitioners and their *amici* now attempt to raise in this Court. (Sch. App. at 47a-51a.) And, in *Scheidler II*, this Court declined to grant certiorari on the First Amendment question presented by petitioners. *See supra* p. 6 & n.3. Nor are First Amendment issues before the Court now. *See supra* pp. 6-7, 9-10.

Simply put, no one is trying to silence petitioners from expressing their views about abortion through lawful, peaceful means; indeed, this Court has already noted and petitioners have admitted that the conduct at issue in this case is "criminal." *Scheidler II*, 537 U.S. at 404 & n.9. Respondents simply seek a court order requiring petitioners to put down their weapons and stop using force, violence and threats against respondents and others. That result, as the courts below held and this Court's case law makes clear, is fully consistent with the First Amendment. *See supra* pp. 1-7, 10 and cases cited; *Madsen*, 512 U.S. at 764 n.2 (finding no prior restraint on protected speech where the injunction was issued because of petitioners'

Hardware, 458 U.S. at 923; *see also Schenck*, 519 U.S. at 373, 375 (citing *Milk Wagon Drivers* favorably); *Madsen*, 512 U.S. at 765, 774 (same).

prior unlawful conduct); *see also Scheidler I*, 510 U.S. at 264 (Souter, J., concurring) (noting that there are no First Amendment interests in "keep[ing] RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling").

C. The Seventh Circuit's Decision Is Not "Irreconcilable with the Long History of Social Protest in This Country"

Invoking the names of Martin Luther, King, Jr., Rosa Parks and other champions of civil rights and civil liberties, the Consistent Life *Amici* also contend that the Seventh Circuit's decision on remand somehow conflicts with this nation's "long history of social protest" and "places all social protestors in grave financial jeopardy." (CL Br. at 3, 24; *see id.* at 24-26.) This doomsday analysis is wholly unjustified. Dr. King, Ms. Parks and the other *peaceful* protestors mentioned simply did not engage in the sort of violent threats and physical assaults engaged in by petitioners, proscribed by the Hobbs Act, and at issue in this case. Indeed, petitioners' conduct directly and unequivocally violates the very principles of nonviolence for which Dr. King stood.[6]

As noted above, petitioners here engaged in repeated acts and threats of physical violence. *See supra* pp. 1-4. It is

---

[6] Dr. King cautioned against "succumb[ing] to the temptation to use violence in our struggle for freedom" lest our legacy be "a long and desolate night of bitterness" and "a never-ending reign of chaos." Martin Luther King, Jr., *The Words of Martin Luther King, Jr.* 71 (selected by Coretta Scott King, 1996). And, unlike petitioners, he promised to "[r]efrain from violence of fist, tongue, or heart"—and he honored that pledge. *Id.* at 74. Had Dr. King, Ms. Parks and others engaged in the sort of violent conduct engaged in by petitioners here, their actions would quite properly not have received First Amendment protection.

only this violent and, as petitioners admit, "criminal" conduct that is at issue in this case and potentially subject to a well-tailored injunctive remedy. *See supra* p. 6-7, 10-11. Dr. King and Ms. Parks would have nothing to worry about from this case.

Moreover, like Dr. King and his followers, the Consistent Life *Amici* have expressly stated that they are committed to "principles of nonviolent direct action" and do not "encourage or condone the use of violence as a legitimate form of social protest." (CL Br. at 8.) Thus, if they abide by this commitment to nonviolence, the Consistent Life *Amici*, along with any other individuals or groups who voice their views through leafleting, picketing, or other peaceful forms of expression without threatening violence, have nothing at all to fear; they would not be liable under the Hobbs Act and would be fully protected by the First Amendment.[7]

---

[7] The contention by the Consistent Life *Amici* that their organizations could still face liability because "sooner or later . . . a member of a loosely defined movement may do things that are not authorized by the leadership" ignores the jury instructions in this case, which made clear that "[l]iability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence." (Sch. App. 185a.; *see also id.* at 48a (noting that plaintiffs were required "to show that PLAN itself, and not merely isolated members, intended that the illegal acts occur, that the defendants were aware of PLAN's illegal aims, and that the defendants held a specific intent to further those aims through their association with PLAN").) As the Seventh Circuit made clear, the district court's "exacting test" for organizational liability was fully satisfied by the record in this case. (*Id.*) *See supra* pp. 4-6.

II. INJUNCTIVE RELIEF IS ESSENTIAL IN THIS CASE TO ENSURE THE SAFETY OF MEDICAL PROFESSIONALS

With the creation and implementation of a carefully tailored injunction, the courts below have prevented petitioners from using illegal, forcible, violent, criminal conduct to pursue their cause against reproductive health care providers. Such an injunction remains necessary to ensure the safety of health care providers and those individuals who work for them and for whom they serve, from the violent acts and threats of violence committed by petitioners. Indeed, the violent nature of petitioners' actions, recognized previously by the lower courts, warrants an injunction against the petitioners' continuing attempts at violent and threatening conduct.[8]

A. A Permanent Injunction Is Necessary Given the Nature of the Acts and Threats of Violence Committed by Petitioners

Given the violent nature of petitioners' actions and the refusal of petitioners to cease committing these acts and further threats of violence, the district court's issuance of a permanent injunction that is tailored to the specific violent conduct is essential. As demonstrated above, petitioners did more than just block a few clinic doorways and make a few threats. Their behavior included more than just holding signs or praying in front of clinics. They created and engaged in a pervasive, nationwide course of conduct that was specifically designed to intimidate clinic staff and patients into giving up their

---

[8] The Seventh Circuit stated on remand that "it appears that it would be an abuse of discretion for the district court to re-enter any nationwide injunction." (Sch. App. 16a.) For the reasons discussed below, we believe that nationwide injunctive relief is an appropriate (and well-tailored) remedy here. In any event, the precise scope of the injunction is a question properly left for the district court on remand.

constitutionally-protected rights and prevent them from carrying out their business. Moreover, the evidence presented at trial established that petitioners have a history of engaging in such unlawful and criminal conduct. The jury found that over a ten-year period the petitioners "committed . . . acts and threats of violence to persons and property across the United States." (Sch. App. 166a.) The jury also specifically found that petitioners committed "4 acts or threats of physical violence," and this finding undoubtedly led to the design of the district court's injunction against petitioners.[9] In fact, petitioners' counsel readily acknowledged at oral argument in *Scheidler II* "that aspects of his clients' conduct were criminal." 537 U.S. at 404.

The district court further found that despite the passage of the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248, petitioners' violent conduct against clinics had continued and had thus not eliminated the need for an injunction in this case. Nor have petitioners agreed not to commit unlawful acts in the future, further necessitating an injunction here. At the post-trial hearing, respondents presented evidence of petitioners' illegal activities since the passage of FACE, including:

---

[9] "In exercising its equitable jurisdiction, '[a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past.'" *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969) (quoting *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 435 (1941)). This Court has thus held that a court's remedy "is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal." *United States* v. *U.S. Gypsum Co.*, 340 U.S. 76, 88-89 (1950).

- Placing of butyric acid in a reproductive health clinic in Orlando, Florida in May of 1998, and petitioners' blocking clinic doors and physically accosting individuals as they attempted to enter a clinic in Chicago in August of 1996. (Sch. App. 167a.)

- Witness testimony that "various injunctions under FACE have been sought and implemented in order to address these activities, but the illegal conduct of the [petitioners] continues as [petitioners] cross state lines to avoid the jurisdiction of the various injunctions." (*Id.*)

- Additional testimony that "blitzkrieg tactics were sometimes used to swoop in on a clinic without warning so as to overwhelm available law enforcement personnel." (*Id.*)

The district court assessed this evidence and found that petitioners had continued their illegal and violent behavior throughout and following the passage of FACE, thus warranting entry of an injunction as to petitioners' conduct. Thus, while, as Justice Ginsburg noted in *Scheidler II*, FACE was crafted as "a statutory response that homes in on the problem of criminal activity at health care facilities," 537 U.S. at 411 (Ginsburg, J., concurring), it is evident from the evidence presented to the district court in this case that this statutory response did not specifically curtail the illegal actions of *these* petitioners. Moreover, FACE might be sufficient to remedy harm done for *future* acts of violence that are directed towards reproductive health care facilities, but that would require an entirely new lawsuit based only on those future acts. For respondents here, FACE is no answer to the extraordinary harm already caused by these petitioners over a period of many years prior to the enactment of FACE. In short, these petitioners should not be permitted to get away with their prior admitted *criminal* conduct, and thus a permanent injunction under RICO to protect

respondents from petitioners' violent conduct must be maintained.[10]

B. A Nationwide Injunction Is the Only Sufficient Remedy

The district court's decision to issue an injunction that was national in scope was also necessary to protect against criminal conduct that was committed by petitioners against reproductive health clinics across the nation. The nationwide scope of the injunction remains necessary because it is clear that petitioners' conduct occurred across the nation and that "injunctions that are geographically limited do not prevent [petitioners] from engaging in illegal conduct." (Sch. App. 167a-168a.) Other courts similarly have held that an injunction can and should be national in scope in the abortion protest context. In *United States* v. *Dinwiddie*, 76 F.3d 913, 929 (8th Cir. 1996), for example, the Eighth Circuit upheld a permanent injunction against an anti-abortion protester, finding that not only was there an interest in protecting the specific health clinic staff and patients involved in the case but also in protecting the patients and staff of other reproductive health clinics across the country from the criminal conduct of the defendant. The Eighth Circuit found that the defendant "could easily frustrate the purpose and spirit of the permanent injunction simply by stepping over state lines and engaging in similar activity at another reproductive health facility." *Id.* at 929 (internal

---

[10] Moreover, it is clear that a permanent injunction is necessary in this case because monetary damages are insufficient to stop petitioners from committing their criminal actions against health clinics. Money simply is not an adequate remedy for the individuals and organizations physically harmed by the violent acts and threats of petitioners. Indeed, here, where petitioners claim to be judgment-proof, the threat of money damages alone has no deterrent effect. And, in any event, the Seventh Circuit held on remand that monetary damages are no longer available in this case. (Sch. App. 16a.)

quotation marks omitted). Courts also have held that an injunction can and should be nationwide in scope in other contexts as well. *See, e.g.*, *United States* v. *Carson*, 52 F.3d 1173, 1184-85 (2d Cir. 1995) (upholding permanent injunction against union official's future participation in affairs of any labor organization); *Bresgal* v. *Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) (enforcing nationwide injunctive relief for migrant workers against forestry labor contractors not party to the litigation, including those not based in the Ninth Circuit). The reasoning of the *Dinwiddie* court along with the evidence presented at trial of petitioners' violent conduct—acts and threats of physical violence committed by petitioners throughout the United States—further buttresses the necessity of a nationwide injunction against petitioners' actions in this case. *See, e.g.*, *supra* pp. 2-4 (noting petitioners' violent acts and threats committed in California, Delaware, Wisconsin, and Washington, D.C.).

As petitioners admitted before this Court, their actions are clearly criminal. Their acts and threats of violence are not protected activities. *See supra* pp. 9-14. Thus, under *Madsen* and *Schenck*, an injunction against the violent conduct engaged in by petitioners, such as the one entered by the district court, is clearly proper. *See supra* note 4. Moreover, it is clear that the district court's prior determination that the injunction against petitioners' conduct must be nationwide was proper in light of petitioners' violent conduct—which has reached health clinics, patients, and staff throughout the nation. To ensure the safety of those who continue to seek and provide medical services at these health clinics, a nationwide permanent injunction is appropriate here and burdens no protected rights.

CONCLUSION

For the reasons stated above, and those in respondents' brief, *amici* respectfully request that the Court affirm the Seventh Circuit's decision below.

Dated: New York, New York
October 21, 2005

Respectfully submitted,

BLAKE M. CORNISH
EDERLINA Y. CO
NARAL PRO-CHOICE AMERICA
1156 15 Street, NW
Suite 700
Washington, D.C. 2005
(202) 973-3000

MARIA T. VULLO
Counsel of Record
WILLIAM J. TAYLOR, JR.
BETH S. FRANK
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Counsel for Amici Curiae

APPENDIX
Particular Statements of Interest of *Amici Curiae*

American Association of University Women

For well over a century, the American Association of University Women ("AAUW"), an organization of over 100,000 members, has been a catalyst for the advancement of women and their transformation of American society. In more than 1,300 communities nationwide, AAUW plays a major role in mobilizing advocates on AAUW priority issues that promote equity for women and girls, including: equal opportunity in education; reproductive choice; equal pay; preserving social security; and other civil rights issues. AAUW promotes the social, economic, and physical well-being of all persons, including freedom from violence. AAUW believes that in order for women to advance in the workplace, education, and all aspects of their lives, women must be free to make their own reproductive health choices. Therefore, AAUW supports the right of every woman to safe, accessible, and comprehensive reproductive health care, including safe access to family planning services and abortion clinics nationwide.

Americans for Democratic Action, Inc.

Americans for Democratic Action, Inc. ("ADA") is an independent liberal political organization, founded in 1947 by Eleanor Roosevelt, Joseph Rauh, and others, dedicated to promoting individual liberty and economic justice. ADA publishes a weekly legislative newsletter for liberal activists, a quarterly newsletter, special reports, including an annual voting record report that ranks Members of Congress according to a liberal quotient, based on a full spectrum of domestic and international policy issues. In addition to its legislative advocacy, ADA maintains a political action committee to support liberal candidates for Congress. ADA also engages in independent campaign activity in support of presidential candidates.

Black Women's Health Imperative

The Black Women's Health Imperative, formerly the National Black Women's Health Project, is a national, not-for-profit, 501(c)(3), educational, scientific, advocacy, research and leadership development organization. Established in 1983, the organization has taken the lead to ensure optimum health for Black women, physically, mentally and spiritually. The Imperative began and sustains a nationwide Black women's health movement to move personal health to the top of the life agenda of every Black woman, and the health of Black women as a top priority on the legislative, policy, and research agenda of the nation.

Center for Reproductive Rights

The Center for Reproductive Rights (the "Center") is a national public interest law firm based in New York City dedicated to preserving and expanding reproductive rights in the United States and throughout the world. The Center's domestic and international programs engage in litigation, policy analysis, legal research, and public education seeking to achieve women's equality in society and ensure that all women have access to appropriate and freely chosen reproductive health services, including contraceptives. The Domestic Legal Program of the Center specializes in litigating reproductive rights cases throughout the United States and is currently lead or co-counsel in a majority of the reproductive rights litigation in the nation.

Center for Women Policy Studies

The Center for Women Policy Studies was founded in 1972 with a mission to shape public policy to improve women's lives. A hallmark of our work is the multiethnic feminist lens through which we view all issues affecting women and girls. In all of our work, we look at the combined impact of gender, race, ethnicity, class, age, disability, and sexual orientation. We struggle for women's human rights—justice and equality for women at home and abroad. The Center represents the interests of all women in the United States whose right and ability to

control their reproductive lives—without fear of physical harm or intimidation—would be greatly hindered by the actions of organizations like the Pro-Life Action Network ("PLAN") and the absence of appropriate legal redress.

Hadassah, WZOA, Inc.

Hadassah, the Women's Zionist Organization of America, founded in 1912, is the largest women's and Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of helping to protect the rights of women and the Jewish community in the United States. Hadassah has a longstanding commitment to supporting a women's right to choose abortion and other reproductive health services. Hadassah views freedom of choice as a matter of privacy of the individual to be determined by each woman in accordance with her religious, moral and ethical values. While Hadassah is committed to upholding First Amendment freedoms including the right of peaceful protest, Hadassah condemns violence at family planning clinics.

Legal Momentum

Legal Momentum (the new name of NOW Legal Defense and Education Fund) advances the rights of women and girls by using the power of the law and creating innovative public policy. A major goal of Legal Momentum's work is to secure reproductive rights for all women. To this end, Legal Momentum has litigated numerous cases involving clinic violence and efforts to protect safe access to reproductive health services, including *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) and *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). Legal Momentum has also intervened on behalf of doctors, women and clinics to defend the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, against constitutional challenges in several cases.

NARAL Pro-Choice America

NARAL Pro-Choice America Foundation/NARAL Pro-Choice America, with 27 state affiliates and hundreds of thousands of members and supporters nationwide, is dedicated to keeping abortion safe, legal, and accessible for all women. NARAL Pro-Choice America's mission is to support and protect, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices through education, training, organizing, legal action, and public policy. NARAL Pro-Choice America recognizes that the nationwide campaign of anti-choice violence threatens women's right to choose abortion by exacting a physical and emotional price from patients who seek access to medical services, and by exacerbating the shortage of providers of abortion.

National Asian Pacific American Women's Forum

Founded in 1996, the National Asian Pacific American Women's Forum ("NAPAWF") is dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of Asian Pacific American ("APA") women and girls. NAPAWF's vision includes strengthening communities to reflect the social, political, and economic concerns and perspectives of APA women and girls; inspiring leadership and promoting the visibility and participation of APA women and girls in the political process and within the broader national and international women's movement; and creating a vehicle for progressive APA women to connect with others across the country to share strategies and form lasting coalitions around policy initiatives and grassroots organizing campaigns. Reproductive freedom and civil rights are among the central issues that form the basis of NAPAWF's advocacy. NAPAWF believes that all women have the fundamental human right to safely access reproductive health care services, including abortion.

National Center for Lesbian Rights

National Center for Lesbian Rights ("NCLR") is a national legal resource center with a primary commitment to advancing the rights and safety of lesbians and their families through a program of litigation, public policy advocacy, and public education. Since its inception in 1977, NCLR has had a strong commitment to freedom of expression and association as well as to reproductive autonomy for all women.

National Council of Jewish Women, Inc.

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and strive to ensure individual rights and freedoms for all through its network of 90,000 members, supporters, and volunteers nationwide. As such we endorse and resolve to work for "the protection of every female's right to reproductive choice, including safe and legal abortion, and the elimination of obstacles that limit reproductive freedom." Consistent with our priorities and resolutions, NCJW joins this brief.

National Health Law Program

Founded in 1969, The National Health Law Program ("NHeLP") is a private, non-profit advocacy organization whose mission is to work for increased and improved access to quality health care for low-income individuals and communities. Since its inception, NHeLP's work has included legal and policy analysis, advocacy, information and education on behalf of low-income women to help secure comprehensive health care, including reproductive health services. NHeLP believes that low-income and other underserved communities, including individuals who are uninsured, already have severely limited access to medically necessary services. Violent acts erode the ability of the health care safety net to provide the range of critical health care to low-income communities.

National Latina Institute for Reproductive Health

The mission of the National Latina Institute for Reproductive Health ("NLIRH") is to ensure the fundamental human right to reproductive health care for Latinas, their families and their communities. Through advocacy, community mobilization, and public education, NLIRH is shaping public policy, cultivating new Latina leadership, and broadening the reproductive health and rights movement to reflect the unique needs of Latinas. NLIRH believes that coercive, discriminatory and/or punitive policies and practices are differentially impacting Latinas and other women of color. For example, welfare family caps, prohibitions on publicly funded abortion, court mandated use of Norplant, mandatory HIV testing of pregnant women or newborns, and policies that criminalize pregnant substance users have disparately impacted women of color. While the tactics and subterfuge may vary, these policies all seek to place the locus of control for reproductive health decisions outside of Latinas' hands, thereby violating the fundamental human right to self determination and undermining the health and well-being of Latinas.

National Partnership for Women & Families

The National Partnership for Women & Families is a non-partisan, non-profit advocacy group founded in 1971 that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership firmly believes that quality health care must include access to the full range of women's reproductive health services. As a result, the National Partnership has a long history of promoting and defending a woman's right to choose by filing *amicus curiae* briefs in major reproductive rights and health cases.

National Women's Law Center

The National Women's Law Center is a Washington-based legal organization that has been working since 1972 to advance and

protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women. The fundamental right to abortion recognized in *Roe* v. *Wade* is of profound importance to the lives, liberty, health, and safety of women throughout the country. Because of the tremendous significance to women of the freedom to choose whether to bear children, the National Women's Law Center seeks to preserve women's right to abortion, which can only be assured if there is access to health care providers.

Women Employed

Women Employed is a non-profit organization whose mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed maintains that it is every individual's fundamental right to obtain health care, and any restriction or impediment to this right should be unlawful. Likewise, employees engaged in the administration of health care should be guaranteed the right to perform their work free from any form of harassment.

Women's Law Project

The Women's Law Project ("Law Project") is a non-profit feminist legal advocacy organization based in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the Law Project is committed to the elimination of sex discrimination and believes that reproductive freedom is an essential component of women's equality. Since our founding, we have frequently represented medical professionals and patients seeking to provide or receive abortion services, often in the face of organized and concerted anti-abortion violence. Our clients have been subjected to arson, death threats, massive and repeated clinic blockades, vandalism of medical equipment and patient records, chemical

attacks, assaults, bomb scares, anthrax hoax letters, and frequent harassment and stalking of doctors, patients, and staff.

Woodhull Freedom Foundation

The Woodhull Freedom Foundation ("WFF") is a non-profit organization that works to affirm sexual freedom as a fundamental human right by protecting and advancing freedom of speech and sexual expression. The Woodhull Freedom Foundation promotes sexuality as a positive personal, social and moral value through research, advocacy, activism, education and outreach.

Supreme Court, U.S.
FILED
SEP 1 - 2005
OFFICE OF THE CLERK

(7)

No. 04-1244

In the

Supreme Court of the United States

JOSEPH SCHEIDLER, et al.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

ARTHUR B. MARK III
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTIONS PRESENTED

1. Does the Seventh Circuit's defiance of this Court's mandate merit summary reversal?

2. Did the Seventh Circuit err by ruling, in conflict with the Ninth Circuit, and in conflict with the official position of the Department of Justice, that private civil litigants may obtain injunctive relief under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute?

3. Did the Seventh Circuit err by ruling, in conflict with the Sixth and Ninth Circuits, and in conflict with the official position of the Department of Justice, that the federal Hobbs Act, 18 U.S.C. § 1951, may plausibly be construed to prohibit, without any connection to robbery or extortion, any act or threat of "physical violence to any person or property" that "in any way or degree . . . affects commerce"?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICUS CURIAE ... 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE MODERN "SUBSTANTIAL EFFECTS" TEST PLACES STRICT LIMITS ON FEDERAL POWER OVER INTRASTATE ACTIVITY 4

A. *Lopez* Announced That the Substantial Effects Standard Bars Federal Regulation of Noncommercial or Noneconomic Intrastate Crime 11

B. *Morrison* Affirmed and Extended *Lopez*, Declaring That Intrastate Acts of Violence Against Persons Falls Outside Congress' Power to Regulate Interstate Commerce Under the Commerce Clause 13

C. *Raich* Does Nothing to Undermine This Court's Holdings in *Lopez* and *Morrison* That Congress' Commerce Power Does Not Extend to Intrastate Acts of Violence 14

II. "FIRST PRINCIPLES" DICTATE STRICT LIMITS TO FEDERAL POWER UNDER THE COMMERCE CLAUSE 17

TABLE OF CONTENTS—Continued

Page

A. The Principle of Enumerated Limited Powers Requires That Regulation of Noncommercial, Intrastate Activity Remain the Province of State Government 17

B. The Principle of Federalism Leaves Regulation of Noncommercial Intrastate Activity to State Governments 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Alden v. Maine, 527 U.S. 706 (1999) 1

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 18-19

Gonzales v. Raich, 125 S. Ct. 2195 (2005) 1, 14-16

Gregory v. Ashcroft, 501 U.S. 452 (1991) 17

In re Jones & Laughlin Steel Corp.,
1 N.L.R.B. 503 (1936) 4, 7-8

Jones v. United States, 529 U.S. 848 (2000) 21

Marbury v. Madison, 5 U.S. 137 (1803) 3, 17

NLRB v. Jones & Laughlin Steel Corp.,
83 F.2d 998 (5th Cir.),
cert. granted, 299 U.S. 534 (1936),
and *rev'd*, 301 U.S. 1 (1937) 4-8, 10, 19, 22

Printz v. United States, 521 U.S. 898 (1997) 1

Reno v. Condon, 528 U.S. 141 (2000) 1

*Solid Waste Agency of Northern Cook County v.
United States Army Corps of Engineers*,
531 U.S. 159 (2001) 1

United States v. Darby, 312 U.S. 657 (1941) ... 4, 8-10, 19

United States v. Lopez, 514 U.S. 549 (1995) ..... passim

United States v. Morrison, 529 U.S. 598 (2000) .... passim

United States v. Wrightwood Dairy Co.,
315 U.S. 110 (1942) 19

Wickard v. Filburn,
317 U.S. 111 (1942) 4, 9-10, 15-16, 19

TABLE OF AUTHORITIES—Continued

Page

United States Constitution

U.S. Const. amend. X 2, 13, 22

U.S. Const. art. I, § 8 13

§ 8, cl. 3 ..... 3, 14

§ 9 13

U.S. Const. pmbl. 3

Federal Statutes

18 U.S.C. § 844(i) 21

§ 921(a)(25)-(26) (1988 & Supp. V 2004) 11

§ 922(q)(1)(A) (1988 & Supp. V 2004) 11

42 U.S.C. § 13981 13-14

Pub. L. No. 101-647, § 1702 11

Court Rules

Sup. Ct. R. 37 1

37.6 1

Miscellaneous

1 Tribe, Laurence H., *American
Constitutional Law* (3d ed. 2000) 3

Abortion Foe Guilty of Murder,
Newsday, Mar. 6, 1994 23

Activist Gets Life for Killing Abortion Doctor,
L.A. Times, Mar. 6, 1994, at A1 22-23

TABLE OF AUTHORITIES—Continued

Page

Barnett, Randy E., *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003) 5

Barnett, Randy E., *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) 5

Beebe, Michael, *Kopp is Convicted of Murder*, Buffalo News, Mar. 19, 2003, at A1 23

Brickey, Kathleen F., *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135 (1995) 23

Chen, Jim, *Filburn's Legacy*, 52 Emory L.J. 1719 (2003) 9-10

Chu, Henry & Clary, Mike, *Doctor, Volunteer Slain Outside Abortion Clinic*, L.A. Times, July 30, 1994 23

Ehrlich, Susan A., *The Increasing Federalization of Crime*, 32 Ariz. St. L.J. 825 (2000) 2

Epstein, Richard A., *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987) 10

H.R. Rep. No. 103-306 (1994) (dissenting views), *reprinted in* 1994 U.S.C.C.A.N. 699. 23

Hughes, Lynn N., *Don't Make a Federal Case Out of It: The Constitution and the Nationalization of Crime*, 25 Am. J. Crim. L. 151 (1997) 2-3

TABLE OF AUTHORITIES—Continued

Page

Mark, Arthur B., III, *United States v. Morrison, The Commerce Clause and the Substantial Effects Test: No Substantial Limit on Federal Power*, 34 Creighton L. Rev. 675 (2001) 8, 10

Pinkham, Paul, et al., *Abortion Doctor's Killer Executed by Injection*, The Florida Times-Union, Sept. 4, 2003, at A1 23

Rehnquist, Chief Justice William H., Supreme Court of the United States, 2003 Year-End Report on the Federal Judiciary (2004), *available at* http://www.supremecourtus.gov/public info/year-end/2003 year-endreport.html 2

Rehnquist, Chief Justice William H., Supreme Court of the United States, 2004 Year-End Report on the Federal Judiciary (2005), *available at* http://www.supremecourtus.gov/public info/year-end/2004year-endreport.pdf 2

The Federalist No. 45 (James Madison) (Clinton Rossiter ed., 1961) 17, 22

Tighe, Michael, *Salvi Convicted in Abortion Clinic Murders*, Seattle Post-Intelligencer, Mar. 19, 1996, at A3 23

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of neither party on the merits according to Supreme Court Rule 37.[1] Petitioners and Respondents have granted written consent for all Amicus Curiae, which has been lodged with the clerk of this Court. Founded in 1973, Pacific Legal Foundation litigates cases affecting the public interest in state and federal courts nationwide. In these cases, PLF seeks to protect individual liberty by advocating that government power must be constrained by the strict limits of the Constitution and enabling statutes.

In this case, the Seventh Circuit has interpreted the Hobbs Act to authorize federal jurisdiction over virtually every violent act in the United States. Such continued erosion of the limits on federal power undercuts individual liberty. This Court must now decide whether that interpretation is consistent with statutory or constitutional limits. That is a question of substantial public interest. PLF has participated in numerous cases before this Court concerning the proper scope of the federal government's enumerated powers, including, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*); *United States v. Morrison*, 529 U.S. 598 (2000); *Reno v. Condon*, 528 U.S. 141 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); and *United States v. Lopez*, 514 U.S. 549 (1995).

---

[1] Pacific Legal Foundation hereby affirms that counsel for any party did not author any part of this brief, nor did any person or entity make a monetary contribution for the purpose of preparing or submitting this brief. Sup. Ct. R. 37.6.

INTRODUCTION

At the end of the Twentieth Century, there were more than 3,600 federal crimes on the books, most of which duplicated offenses long prosecuted under state law. Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L.J. 825, 826; 837-42 (2000). In 2003, the number of criminal cases filed in federal court had risen to 70,642, "surpassing the previous record reported in 1932, the year before the Prohibition Amendment was repealed." Chief Justice William H. Rehnquist, Supreme Court of the United States, 2003 Year-End Report on the Federal Judiciary (2004), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2003 year-endreport.html. This number shows no signs of diminishing. Chief Justice William H. Rehnquist, Supreme Court of the United States, 2004 Year-End Report on the Federal Judiciary (2005), *available at* http://www.supreme courtus.gov/publicinfo/year-end/2004year-endreport.pdf.

As federal legislation increasingly resembles general police power regulations, the power of states to regulate the everyday affairs of their citizens diminishes. Ehrlich, *supra*, at 837-38. Thus, federalism, the dual-sovereignty established by the Constitution, and necessary to preserve individual freedom, is diminished. Lynn N. Hughes, *Don't Make a Federal Case Out of It: The Constitution and the Nationalization of Crime*, 25 Am. J. Crim. L. 151, 158-59 (1997). *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."); *Lopez*, 514 U.S. 549 (finding the Constitution requires definite limits on federal power). As federal power expands, state governments are gradually becoming no more than provincial stewards, reduced to carrying out the federal government's orders and policies. Ehrlich, *supra*, at 838-42. In addition, federalization of crime trivializes criminal law and

weakens respect for all laws due to nonenforcement and selective enforcement. Hughes, *supra*, at 160.

If the limits on federal power established by the Constitution "are to have any real meaning, Congress must be prevented not only from formally destroying states but also from acting in ways that would leave a state formally intact but functionally a gutted shell." 1 Laurence H. Tribe, *American Constitutional Law* 865 (3d ed. 2000). It is the duty of the federal courts to interpret the law consistent with the Constitution's limits on government power and its central purpose of preserving individual freedom. U.S. Const. pmbl.; *Marbury v. Madison*, 5 U.S. 137, 176-78 (1803). In considering the interpretation of the Hobbs Act expounded by the court below, this Court should have firmly in mind its recent Commerce Clause precedents and the fundamental rationale underlying those precedents: that the Constitution limited federal power to that enumerated—the regulation of commerce "among the several states." U.S. Const. art. I, § 8, cl. 3.

SUMMARY OF ARGUMENT

Given Congress' penchant for federalizing every crime it can, this Court needs to continue to define limits on Congress' authority under the Commerce Clause. Whatever the Court decides with respect to the Seventh Circuit's interpretation of the Hobbs Act and its applicability to acts or threats of violence against persons or property independent of robbery or extortion, any decision should reflect the constitutional "first principles" inherent in the fact that there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 617.

ARGUMENT

I

THE MODERN "SUBSTANTIAL EFFECTS" TEST PLACES STRICT LIMITS ON FEDERAL POWER OVER INTRASTATE ACTIVITY

Crime is inherently intrastate activity, so federal control of any particular species of crime under the Commerce Clause must rely on this Court's test for when Congress can constitutionally control activities having a substantial relation to interstate commerce. The modern substantial effects test derives from three noteworthy cases that ushered in an expansive application of the commerce power, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *United States v. Darby*, 312 U.S. 657 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942). These cases established the outer limits of Congress' authority to regulate under the Commerce Clause.

In *Jones & Laughlin Steel*, the Jones & Laughlin Steel Corporation was charged with unfair labor practices under the National Labor Relations Act when the corporation apparently discharged 12 employees from its Aliquippa, Pennsylvania, plant because they had joined the union and assisted in collective bargaining activities. *In re Jones & Laughlin Steel Corp.*, 1 N.L.R.B. 503, 503-04, *enforcement denied*, *NLRB v. Jones & Laughlin Steel Corp.*, 83 F.2d 998 (5th Cir.), *cert. granted*, 299 U.S. 534 (1936), and *rev'd*, 301 U.S. 1 (1937).

As a defense, Jones & Laughlin Steel argued that the Act was constitutionally infirm because it did not regulate interstate commerce but was a gambit aimed at subjecting all industrial labor relations to federal control without regard to the effects on interstate commerce. *See Jones & Laughlin Steel*, 301 U.S. at 29.

To determine the object of the Act, this Court looked to the statutory language itself and observed that the Act empowered the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." *Id.* at 30. The Act, in turn, defined "commerce" in the traditional sense to mean "trade, traffic, commerce, transportation, or communication among the several states." *Id.* at 31.[2] The Act went further and also defined the term "affecting commerce."

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Id.

Because the National Labor Relations Act explicitly limited the Board's jurisdiction to only those labor practices actually "affecting commerce," this Court found the Act was a valid Commerce Clause enactment. By "its terms," this Court noted, the Act does "not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce." *Id.* Rather, this Court found, "[i]t purports to reach only what may be deemed to burden or obstruct that

---

[2] *See generally* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) (chronicling examples of the uniform use of the word "commerce" to mean only trade or exchange in founding era dictionaries, constitutional convention speeches, the Federalist papers, and state ratification conventions); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 858 (2003) (analyzing 1600 appearances of the word "commerce" in the *Pennsylvania Gazette* from 1728-1800 and concluding the word was "routinely used to refer to trade or exchange, including shipping" and routinely distinguished from agriculture and manufacturing).

commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds." *Id.*

The significance of this analysis, as would later become clear in *Lopez* and *Morrison*, lies in this Court's search for a jurisdictional element tying the regulated intrastate activity to impacts affecting commerce (so as to limit the scope of the Act to the delegated authority) and this Court's reliance on the terms of the Act itself; on what the Act expressly purports to regulate.

After upholding the Act facially, this Court considered whether the regulated activity was within constitutional bounds as applied in that particular case; that is, whether the unjustified firing of employees would affect (i.e., burden or obstruct) interstate commerce. *Jones & Laughlin Steel*, 301 U.S. at 32. The record showed that Jones & Laughlin Steel was the fourth largest steel producer in the country with nineteen subsidiaries and integrated operations throughout the nation that included production as well as transportation and sale of products in interstate commerce. *Id.* at 25-26. In counterpoint, however, was the fact that the discharged employees worked only in the local manufacturing plant and were not involved in transporting or selling the product in interstate commerce. *Id.* at 40. According to this Court, this latter fact was not determinative. *Id.* Rather, the case turned on how the stoppage of Jones & Laughlin Steel's manufacturing operations by industrial strife—which the National Labor Relations Act was designed to prevent—would affect interstate commerce. *Id.* at 41.

In considering the matter, this Court relied on what it called the fundamental principle "that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement.' " *Id.* at 36-37 (citations omitted). "That power is plenary," this Court said, "and may be exerted to protect interstate commerce 'no matter what the

source of the dangers which threaten it.' " *Id.* at 37 (citation omitted). This Court said further:

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

Id.

This statement describes that category of Commerce Clause enactments that substantially affects interstate commerce. As with similar statements of the "substantial effects" category of Commerce Clause regulation, this Court was focused on finding a "close and substantial" impact on interstate commerce and determining whether the regulation was necessary "to protect that commerce."

In view of Jones & Laughlin Steel's far-flung activities, this Court found the stoppage of its intrastate manufacturing operations by industrial strife would have a serious effect on interstate commerce that is direct, immediate, and even catastrophic.[3] *Id.* at 41. When an industry on a national scale

---

[3] Jones & Laughlin produced steel, steel ingots, finished rolled products, coke and pig-iron at two Pennsylvania plants, Aliquippa and Pittsburgh. [*In re Jones & Laughlin Steel Corp.*, 1 N.L.R.B.] at 504-05. It operated as a vertically integrated conglomerate owning ore, coal and limestone mines as well as lake and river boats and facilities and railroad track, terminals and cars. *Id.* at 505. The mines were located in Michigan, Minnesota, Pennsylvania, and West Virginia. *Id.* The company maintained warehouses, steel-fabricating shops, distribution centers, stores and yards throughout the Midwestern and Northeastern United States. *Id.* at 506. Although Jones & Laughlin manufactured its products within

(continued...)

makes its relation to interstate commerce a "dominant factor," this Court concluded, Congress may regulate intrastate activity—in this case labor relations—"to protect interstate commerce from the paralyzing consequences of industrial war." *Id.*

In *United States v. Darby*, this Court upheld the Fair Labor Standards Act, which prohibited the shipment, in interstate commerce, of goods that were produced without compliance with the Act's standards for employee wages and hours. *Darby*, 312 U.S. at 109. This Court determined interstate commerce is injured when it is used as an instrument of unfair competition "in the distribution of goods produced under substandard labor conditions." *Id.* at 115. This case extended the reach of the Commerce Clause to local manufacturing operations—an intrastate activity—that this Court had previously determined were beyond the scope of congressional authority. *Id.* at 115-17. This Court explained the scope of that authority in these terms:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Id. at 118.

Once again, this Court's inquiry was directed at both the significance of the regulated activities' effect on interstate commerce and the legitimacy of the end, or purpose, of the regulation (i.e., whether Congress was exercising control over interstate commerce).

In a further extension of the "substantial effects" category of Commerce Clause enactments, this Court upheld the economic regulation of local wheat production in *Wickard v. Filburn* under the Agricultural Adjustment Act of 1938. Among other things, that Act involved a national regulatory scheme to control the price of wheat by regulating the volume of wheat on the market. "Acreage limitations were the Act's primary tool for controlling the supply of federally subsidized crops." Jim Chen, *Filburn's Legacy*, 52 Emory L.J. 1719, 1734 (2003). Before the 1941 planting season, it was clear that the low prices for wheat were the result of excessive supply. *Id.* "Only stiffer penalties on excess production could prevent already overflowing stocks from surpassing the all-time high, which had been reached in 1940." *Id.*

Under the Act, the Secretary of Agriculture was directed "to proclaim a national acreage allotment for each year's wheat crop." *Id.* at 1735. Because of a growing fear of a glut in the market and the associated price crash, allotments were set and penalties raised for excess crops during the 1941 growing season. *Id.* Roscoe Filburn was subject to this regulation.

Filburn was a lifelong farmer who raised dairy cattle and poultry. He also grew wheat which he sold, fed to his cattle and poultry, and used for household consumption. *Id.* at 1734. Additionally, Filburn ran a commercial business selling milk and eggs to about 75 customers a day from the cattle and

---

[3] (...continued)
Pennsylvania, seventy-five percent were shipped out of the state. *Id.* In 1934, the company employed a total of 523,000 men. *Id.* at 507.

Arthur B. Mark III, *United States v. Morrison, The Commerce Clause and the Substantial Effects Test: No Substantial Limit on Federal Power*, 34 Creighton L. Rev. 675, 711 n.375 (2001) (citing *In re Jones & Laughlin Steel Corp.*, 1 N.L.R.B. at 504-07).

poultry he fed with the wheat. *Id.* Filburn's allotment was 11.1 acres, but he planted 23 acres instead. The extra acreage yielded 239 bushels of wheat in excess of Filburn's allotment. Filburn was, therefore, fined for the excess, which he subsequently challenged in federal court.

On review, this Court found that home-grown wheat competes with wheat in interstate commerce either by entering the market or, if consumed by the grower, reducing the purchase of wheat in the market. *Wickard*, 317 U.S. at 128. And while the grower's "own contribution to the demand for wheat may be trivial by itself," this Court held that the aggregate economic effect of "others similarly situated, is far from trivial" and can be regulated. *Id.* at 127-28.

By amassing trivial effects of similar activity to find a "substantial effect" on interstate commerce, *Wickard* pushed the very limits of Congress' Commerce Clause authority. Never had this Court so liberally construed or so broadly applied the commerce power.

Together, *Jones & Laughlin Steel*, *Darby*, and *Wickard* ushered in a new era of expanding federal regulation of intrastate activity that seemed to recognize no limit on congressional authority under the Commerce Clause. *See* Mark, *supra* (arguing that aggregation under the substantial effects standard provides no meaningful stopping point to the reach of the commerce power). The rationale of these cases enhanced federal control to the seeming permanent detriment of the constitutional principle of limited government. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1451-52 (1987). Recently, however, this Court has held that the principle of a limited federal government, which preserves to the states control over most intrastate activity, in particular violent crime, is a vital consideration in determining the extent of federal power.

A. *Lopez* Announced That the Substantial Effects Standard Bars Federal Regulation of Noncommercial or Noneconomic Intrastate Crime

In *Lopez*, the Court held the Gun Free School Zones Act of 1990 unconstitutional, as exceeding Congress' power to regulate commerce as granted by the Constitution. *Lopez*, 514 U.S. at 551, 561. The Gun Free School Zones Act provided: "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." Pub. L. No. 101-647, § 1702 (codified as 18 U.S.C. § 922(q)(1)(A) (1988 & Supp. V 2004)). A "school zone" was defined as on the grounds of or being within 1,000 feet of a public, private, or parochial school providing elementary or secondary education. Pub. L. No. 101-647, § 1702 (codified as 18 U.S.C. § 921(a)(25)-(26) (1988 & Supp. V 2004)).

The government prosecuted Alfonso Lopez, Jr., under the Gun Free School Zones Act for carrying an unloaded .38 caliber handgun and bullets to his high school in San Antonio, Texas. *Lopez*, 514 U.S. at 551. Passing upon the question of whether Congress exceeded its power under the Commerce Clause in criminalizing gun possession on the grounds of or within 1000 feet of schools, this Court discussed at length its Commerce Clause jurisprudence from the founding era forward, concluding under the commerce power, Congress may regulate three categories of activity: (1) use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities having a substantial relation to interstate commerce. *Id.* at 552-59.

The Court concluded the Gun Free School Zones Act could only be sustained, if at all, under Congress' power to regulate intrastate economic activities substantially affecting interstate commerce. *Id.* at 559. Discussing the nature of the

"substantially affects" test, this Court concluded: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 560. Specifically regarding the Gun Free School Zones Act, the Court held the statute could not "be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561. Simply, "section 922(q) [was] a criminal statute that by its terms [had] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* Regulating gun possession in a school was not part of "a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* Thus, this Court held that Congress could not rely on the aggregate effects on interstate commerce of intrastate, noneconomic conduct to support federal regulation under the Commerce Clause. *Id.*

Further, this Court rejected the government's attempt to "pile inference upon inference" in order to show that gun possession in schools could lead to a "substantial effect" on interstate commerce.[4] *Id.* at 564-68. Such an argument, this Court found, would mean Congress could regulate all violent crime and all activities leading to violent crime, thus giving Congress a general police power under the Commerce Clause. *Id.* at 564, 567-68. However, the Constitution proscribes such

---

[4] The government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped education process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

Lopez, 514 U.S. at 564.

a result, only giving Congress limited power to regulate truly national issues, reserving the remainder to the states or to the people. *Id.* at 552-53, 568; *see* U.S. Const. art. I, §§ 8 & 9; amend. X.

B. *Morrison* Affirmed and Extended *Lopez*, Declaring That Intrastate Acts of Violence Against Persons Falls Outside Congress' Power to Regulate Interstate Commerce Under the Commerce Clause

In *Morrison*, this Court, relying on *Lopez*, invalidated the Violence Against Women Act, which purported to give victims of violent crimes against their person or property, committed "because of gender," a federal civil rights cause of action. 42 U.S.C. § 13981. The case arose out of Christy Brzonkala's rape, which she alleged violated section 13981. *Morrison*, 529 U.S. at 603-04. Like the Gun Free School Zones Act, the federal government sought to sustain section 13981 as "a regulation of activity that substantially affects interstate commerce." *Id.* at 609. This Court explained that *Lopez* set forth a four-part inquiry for determining the constitutionality of the VAWA, which relied on the Commerce Clause: (1) whether the regulated activity is economic in nature; (2) whether the statute contains an express jurisdictional element; (3) express legislative findings that the regulated activity substantially affects interstate commerce; and (4) the degree of attenuation between the regulated activity and interstate commerce. *Morrison*, 529 U.S. at 607-13.

Applying the four factors, this Court found the first factor, the noneconomic, criminal nature of the activity, central to the inquiry regarding whether Congress could regulate such activity under the Commerce Clause. *Id.* at 610. "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613. Therefore, Congress could not aggregate the effects of this noneconomic activity to sustain regulating it

under the Commerce Clause. *Id.* Further, section 13981 contained no jurisdictional element and Congress' findings with respect to how gender-motivated crimes of violence substantially affect interstate commerce were rejected because they relied on the same kind of inferential reasoning rejected as unworkable under *Lopez*. *Morrison*, 529 U.S. at 613-16. This Court found the effects on interstate commerce cited by Congress—deterring victims from traveling; from engaging in employment in interstate business; increasing medical costs; diminishing national productivity—too attenuated from crimes of violence against women, such as rape, stressing that

> [i]f accepted, [the government's] reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Id. at 615. Thus, intrastate acts of violence against all persons or property falls outside the power granted to Congress to regulate "commerce . . . among the several states." *Id.* at 607; U.S. Const. art. I, § 8, cl. 3.

C. *Raich* Does Nothing to Undermine This Court's Holdings in *Lopez* and *Morrison* That Congress' Commerce Power Does Not Extend to Intrastate Acts of Violence

In *Raich*, 125 S. Ct. 2195, this Court decided that the federal government could constitutionally prosecute those who, wholly intrastate, grew and possessed marijuana for medicinal use. *Raich*, 125 S. Ct. at 2201. The Court's rationale was based on the fact that the federal Controlled Substance Act was

a "comprehensive framework for regulating the production, distribution, and possession of . . . controlled substances." *Id.* at 2210. This scheme aimed to regulate which controlled substances could be used for medical purposes. *Id.* at 2211. Marijuana, for whatever use, is a fungible product and would, like the wheat grown in *Wickard*, overhang the market and undercut the regulation of the market for medical substances established by the Controlled Substances Act. *Raich*, 125 S. Ct. at 2211-15. *See Wickard*, 317 U.S. at 128 (noting home-grown and consumed wheat "overhangs the market and if induced by rising prices tends to flow into the market and check price increases"). Given the comprehensive nature of the Controlled Substances Act's regulation of interstate markets in drugs, including marijuana, the Court found regulation of the intrastate growing and possession of medical marijuana appropriate under the aggregation principle. *Raich*, 125 S. Ct. at 2211-15.

The key to federal power in *Raich* was the fact that the Controlled Substances Act was a comprehensive scheme regulating an interstate market in narcotics. *Id.* at 2211-12. The Court explained the Controlled Substances Act regulates drugs that have useful and legitimate medical purposes and imposes controls on the entire market—from manufacturers, to physicians, to pharmacies. *Id.* The Court reasoned that within that unified scheme of regulation of a very specific market, it was necessary to regulate marijuana grown, wholly intrastate, for medical use because failure to do so could seriously undermine the regulation of the entire interstate narcotics market. *Id.* at 2211-15. Implicit in the Court's holding is the fact that if states could exempt from the federal market regulatory scheme one banned narcotic, they could do so with others, further undermining federal control. *Id.* at 2213.

That Congress had created a distinctive and comprehensive scheme for regulating a market in drugs—from production to distribution—was the distinguishing feature that brought the activity at issue in *Raich* within the realm of

commercial or economic activity. *Id.* at 2209-11. "Unlike those activities at issue in *Lopez* and *Morrison*, the activities regulated by the Controlled Substances Act are quintessentially economic." *Raich*, 545 U.S. at 2211. "The Controlled Substances Act is a statute that regulates the production, distribution and consumption of commodities for which there is an established, and lucrative interstate market." *Id.* Prohibiting a particular commodity from entering that market was therefore a regulation of interstate commerce. *Id.* Because the Controlled Substances Act aimed at regulating the production or distribution of a fungible commodity that was sold in an interstate market, the aggregation doctrine applied to allow regulation of marijuana grown and distributed wholly intrastate for medical use. *Id.* at 2215. *Raich*, therefore, does not undermine *Lopez* and *Morrison* because neither *Lopez* nor *Morrison* considered statutes explicitly aimed at regulating an interstate market in a particular commodity.

In fact, *Raich* confirms what *Lopez* and *Morrison* held with respect to Congress' power and this Court's Commerce Clause jurisprudence: that Congress' power under the Commerce clause, however broad, only reaches regulation of interstate commerce. "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone [and intrastate violent crime] does not." *Lopez*, 514 U.S. at 560; *Morrison*, 529 U.S. at 609. *Raich* could be substituted for *Wickard* in the preceding quote, and the principle established by *Lopez* and *Morrison* remains: Congress cannot regulate noncommercial or noneconomic conduct under the Commerce Clause. Therefore, the holdings and rationales of *Lopez* and *Morrison*—that the federal commerce power cannot constitutionally control violence against persons or property—should inform the Court's interpretation of the Hobbs Act in this case.

II

"FIRST PRINCIPLES" DICTATE STRICT LIMITS TO FEDERAL POWER UNDER THE COMMERCE CLAUSE

This Court's Commerce Clause jurisprudence recognizes two "first principles" as a constraint on federal constitutional power. First, is that the "Constitution creates a Federal Government of enumerated powers." *Lopez*, 514 U.S. at 552. " 'The powers delegated by the . . . Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' " *Id.* (quoting The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). Second, is that " 'a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.' " *Lopez*, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). "Were the federal government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). *See Gregory*, 501 U.S. at 459 ("In the tension between federal and state power lies the promise of liberty.").

A. The Principle of Enumerated Limited Powers Requires That Regulation of Noncommercial, Intrastate Activity Remain the Province of State Government

This Court has emphasized the importance of respecting and enforcing the limited powers granted to Congress under the Constitution. In *Marbury*, 5 U.S. at 176, this Court declared:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed.

This principle of limited federal power has informed many of this Court's important decisions defining the limits of Congress' power under the Commerce Clause.

The seminal case of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), in considering the scope of the power granted to Congress under the Commerce Clause, made it clear that the power was limited to regulating interstate commerce:

> It is not intended to say that [the Commerce Clause] comprehend[s] that *commerce*, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary . . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal *commerce* of a State.

Gibbons, 22 U.S. at 194-95 (emphasis added). What necessarily follows from this proposition is that the Commerce Clause does not allow Congress to reach noncommercial or noneconomic activities. Indeed if Congress cannot reach the "exclusively internal commerce of a state" under the Commerce

Clause, it cannot reach beyond internal *commerce* altogether to govern intrastate, *noncommercial* activities.

This Court's Commerce Clause jurisprudence from *Gibbons* forward, detailed in *Lopez*, found that "even these modern-era precedents [*Jones & Laughlin Steel*, *Darby*, and *Wickard*] which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Lopez*, 514 U.S. at 556-57. That the limit is governance of interstate commerce is evident from cases like *Jones & Laughlin Steel*, *Darby*, and *Wickard*.

In *Jones & Laughlin Steel*, this Court found that Congress may regulate intrastate activities the control of which is "essential or appropriate to protect [interstate] commerce from burdens and obstructions." *Jones & Laughlin Steel*, 301 U.S. at 37. Likewise, in *Darby*, this Court held that Congress can regulate intrastate activities for the "attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Darby*, 312 U.S. at 118. And, in *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942), which was decided the same year as *Wickard*, this Court held that the power of Congress to regulate commerce "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." *Wrightwood Dairy*, 315 U.S. at 119.

These precedents all support one central theme: that the power to regulate commerce among the several states is and was limited to the ability to enact "all appropriate legislation" for "its protection and advancement." *Jones & Laughlin Steel*, 301 U.S. at 37 (citation omitted). Statutes that "neither regulate[] a commercial activity nor contain[] a requirement that [the regulated activity] be connected in any way to interstate commerce . . . . exceed[] the authority of Congress 'to regulate Commerce . . . among the several States.'" *Lopez*, 514 U.S. at 551 (citation omitted). Indeed, *Morrison* proscribed the

federal government's attempt to convert the attenuated effects of violence against women on interstate commerce to substantial effects on interstate commerce:

> Congress found that gender-motivated violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products. H.R. Conf. Rep. No. 103-711, at 385, U.S. Code Cong. & Admin. News 1994, pp. 1803, 1853 . . . . The reasoning that [the government] advance[s] seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, [the government's] reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.

Morrison, 529 U.S. at 615. "Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part." *Id.* Thus, the bright line rule announced in *Morrison*: Congress may not constitutionally regulate intrastate activity—such as violence against persons or property—that is noneconomic or noncommercial in nature. *Id.* at 613, 617.

This rule holds even where a statute premised on the power to regulate interstate commerce contains a "jurisdictional element." For example, in *Jones v. United States*, 529 U.S. 848, 850 (2000), the Court considered a federal statute, 18 U.S.C. § 844(i), that made it a crime to damage or destroy "by means of fire or an explosive, any . . . property used in interstate or foreign commerce." Dewey Jones was convicted under this statute for burning down a house in Fort Wayne, Indiana. *Jones*, 529 U.S. at 850. In rejecting the Government's arguments that prosecuting Jones was protecting interstate commerce because the house was collateral for a mortgage, was insured by an out-of-state insurance company, and received utilities from out-of-state companies, this Court held "section 844(i) is not soundly read to make virtually every arson in the country a federal offense. We hold that the provision covers only property currently used in [interstate] commerce or in an activity affecting [interstate] commerce." *Id.* at 859. In so holding, the Court affirmed that acts of Congress passed pursuant to the Commerce Clause must truly govern interstate commerce and cannot be converted into sweeping federal anti-crime laws via attenuated effects. *Id.* at 857.

Jones's holding fits perfectly with *Morrison*'s, which condemned the federal government's attempt to regulate violence against women under the guise of a statute that purportedly was aimed at regulating interstate commerce.

B. The Principle of Federalism Leaves Regulation of Noncommercial Intrastate Activity to State Governments

With respect to the scope of the commerce power, this Court has found it

> must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our

> complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Jones & Laughlin Steel, 301 U.S. at 37. As this Court reasoned in *Morrison* and *Lopez*, any noneconomic or noncommercial intrastate activity can be said to "affect" "national productivity" and thus interstate commerce through a chain of inferential reasoning. *Lopez*, 514 U.S. at 565-68; *Morrison*, 529 U.S. at 612-17. However, this Court rejected such broad power under the Commerce Clause, finding that it would undermine the principle of dual sovereignty to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. Thus, our system of dual government left the regulation of noncommercial intrastate activities to the States.

"The powers reserved to the several States . . . extend to all objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State." The Federalist No. 45, at 293. *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."). Violence against persons or their property is within the core of this reserved power. *Morrison*, 529 U.S. at 617. Indeed, the states have vigorously used their police power to prosecute noncommercial, intrastate acts of violence like those at issue in this case.

One case in point is Michael Griffin, who murdered Dr. David Gunn outside an abortion clinic in Pensacola, Florida. *Activist Gets Life for Killing Abortion Doctor*, L.A. Times, Mar. 6, 1994, at A1. The State of Florida convicted Michael Griffin of first degree murder for the death of Dr.

Gunn. *Abortion Foe Guilty of Murder*, Newsday, Mar. 6, 1994. He was sentenced to life in prison. *Activist Gets Life for Killing Abortion Doctor*, *supra*.

Florida also convicted and put to death Paul Hill, who murdered Dr. John Britton and his security escort in 1994. Henry Chu & Mike Clary, *Doctor, Volunteer Slain Outside Abortion Clinic*, L.A. Times, July 30, 1994; Paul Pinkham et al., *Abortion Doctor's Killer Executed by Injection*, The Florida Times-Union, Sept. 4, 2003, at A1.

The State of New York prosecuted and convicted James Kopp of the intentional murder of Dr. Bernard Slepian, a New York abortion doctor. Michael Beebe, *Kopp is Convicted of Murder*, Buffalo News, Mar. 19, 2003, at A1.

The State of Massachusetts convicted John Salvi on two-counts of first degree murder and five counts of assault with intent to murder; Salvi was sentenced to life in prison without the possibility of parole. Michael Tighe, *Salvi Convicted in Abortion Clinic Murders*, Seattle Post-Intelligencer, Mar. 19, 1996, at A3.

Overall, from 1989-1994, approximately 70,000 arrests by state and local law enforcement officers were made in relation to protests outside abortion clinics. H.R. Rep. No. 103-306, at 24 (1994) (dissenting views), *reprinted in* 1994 U.S.C.C.A.N. 699, 719. This history of state prosecutions shows that even where a certain type of violence is "national" in scope, it is the role of state governments to suppress such crime and vindicate the interests of victims. Not only that, it is logical that states regulate violence against persons or property because each instance of such violence is intrastate and impacts intrastate interests. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1137 (1995). As such, this Court has "always [] rejected readings of the Commerce Clause and the scope of

federal power that would permit Congress to exercise a police power." *Lopez*, 514 U.S. at 584.

CONCLUSION

The Seventh Circuit construed the Hobbs Act to reach wholly intrastate acts of violence against persons or property. Because the Hobbs Act is an exercise of Congress' power under the Commerce Clause, this interpretation raises serious questions concerning the scope of federal power under the Commerce Clause. In considering the Seventh Circuit's interpretation of the Hobbs Act, this Court should adhere to "first principles" as it did in *Lopez* and *Morrison*: that Congress' powers are "few and defined" in order to prevent converting "congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 517.

DATED: September, 2005.

Respectfully submitted,

ARTHUR B. MARK III
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

(22) (21)

Nos. 04-1244 & 04-1352

Supreme Court, U.S.
FILED
OCT 21 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF *AMICI CURIAE* OF THE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, ET AL. IN SUPPORT OF RESPONDENTS

(List of *Amici Curiae* on Inside Cover)

DAVID J. PFEFFER
IGOR M. TSIBELMAN
ARENT FOX PLLC
1675 Broadway
New York, NY 10019
(212) 484-3900

DEANNE M. OTTAVIANO*
GRETCHEN A. DIXON
MELISSA D. DROLLER
ARENT FOX PLLC
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 857-6000

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF *AMICI CURIAE*

The Religious Coalition for Reproductive Choice
The American Humanist Association
Americans for Religious Liberty
Disciples for Choice
The Unitarian Universalist Association
United Church of Christ Justice and Witness Ministries

QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether the Hobbs Act prohibits acts or threats of physical violence that obstruct, delay or affect interstate commerce?

2. Whether RICO authorizes the district courts to grant injunctive relief in private lawsuits?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. The Hobbs Act Prohibits Petitioners' Nationwide Pattern of Violent Efforts to Impose Their Views on Others	5
A. The Plain Language of the Hobbs Act Prohibits Petitioners' Violent Acts	7
B. The Supreme Court Has Already Supported the Three-Way Interpretation of the Hobbs Act	8
C. Congress Intended that the Hobbs Act Would Forbid Petitioners' Acts of Violence	10
II. RICO Authorizes District Courts To Grant Injunctive Relief In Private Lawsuits	12
A. RICO's Plain Language and Structure Authorize Injunctive Relief to Private Plaintiffs	12
B. RICO Does Not Expressly Preclude An Award of Injunctive Relief to Private Plaintiffs	14
C. Analysis of the Clayton Act's Equitable Relief Provisions Does Not Support a Different Result	16

TABLE OF CONTENTS – Continued

Page

D. Public Policy Supports the Seventh Circuit's Holding that RICO Authorizes Injunctive Relief to Private Parties..... 18

CONCLUSION..... 19

TABLE OF AUTHORITIES

Page

CASES:

Aetna Cas. & Sur. Co. v. Liebowitz, 570 F. Supp. 908 (E.D.N.Y. 1983), *aff'd*, 730 F.2d 905 (2d Cir. 1984) 15

Bell v. Hood, 327 U.S. 678 (1946) 16

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 2

Califano v. Yamasaki, 442 U.S. 682 (1979) 15

Chambers Dev. Co. v. Browning-Ferris Indus., 590 F. Supp. 1528 (W.D. Pa. 1984) 14

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 7, 11

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) 14, 15, 16

In re Managed Care Litigation, 298 F. Supp. 2d 1259 (S.D. Fla. 2003) 14

Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961) 8

Motorola Credit Corp. v. Uzan, 202 F. Supp. 2d 239 (S.D.N.Y. 2002) 15

National Organization For Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) 3, 4, 6

National Organization For Women, Inc. v. Scheidler, 91 Fed.Appx. 510, 2004 WL 375995 (7th Cir. 2004) 3, 4, 6

National Organization for Women, Inc. v. Scheidler, No. 86-C-7888, 1999 WL 571010 (N.D. Ill. Jul. 28, 1999) 18

TABLE OF AUTHORITIES – Continued

Page

Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 7

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 8

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 16

Scheidler v. National Organization for Women, Inc., 537 U.S. 393 (2003) 9

Sorenson v. Secretary of Treasury, 475 U.S. 851 (1986) 8

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 13

Stirone v. United States, 361 U.S. 212 (1960) 8

U.S. v. Culbert, 435 U.S. 371 (1978) 9

U.S. v. Franks, 511 F.2d 25 (6th Cir. 1975) 9

U.S. v. Yankowski, 184 F.3d 1071 (9th Cir. 1999) 9

United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988) 8

Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) 8

STATUTES

15 U.S.C. § 15 ..... 17, 18

15 U.S.C. § 25 17

15 U.S.C. § 26 17

18 U.S.C. § 248 ..... 3, 4, 18

18 U.S.C. § 1951(a) 5, 7, 8, 10, 11

18 U.S.C. § 1951(b)(1) 7, 8

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1951(b)(2) 7

18 U.S.C. § 1961 5

18 U.S.C. § 1962 ..... 5, 12, 13, 15

18 U.S.C. § 1963 5

18 U.S.C. § 1964 ..... *passim*

18 U.S.C. § 1964(c) 5, 13, 16, 17

18 U.S.C. § 1965 5

18 U.S.C. § 1966 5

18 U.S.C. § 1967 5

18 U.S.C. § 1968 5

84 Stat. 922 16

Pub. L. No. 91-452 16

OTHER AUTHORITIES

Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 SUP. CT. REV. 129, 142 (1994) 6

INTEREST OF *AMICI CURIAE*

Amici[1] are voluntary associations of persons committed to the principle that every woman must be free to decide if and when to have children according to the dictates of her conscience and religious beliefs.[2]

The lead organization – The Religious Coalition for Reproductive Choice – founded in 1973 by clergy and laity, is a non-partisan, non-profit education and advocacy organization of national groups and caucuses from major denominations including the Episcopal Church, Presbyterian Church (USA), United Church of Christ, United Methodist Church, Unitarian Universalist Association, and Reform and Conservative Judaism. Although the membership has diverse views about abortion rights, all agree that decisions about family, including whether and when to have children, are matters of individual conscience that must be made free of coercion and violence of any kind.

Amici believe that free, peaceful and unrestricted debate on the issue of abortion is a fundamental aspect of religious and constitutional liberty. However, religious and constitutional freedoms cannot flourish in a society that permits organizations to engage in violence, threats and fear without restraint. It is important to us and to all who

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members or counsel, made a monetary contribution to the preparation or submission of this brief. This brief is submitted with the consent of the parties, whose consent letters have been filed with the Clerk.

[2] Individual statements of the *amici curiae* are attached in the Appendix.

seek peaceful social dialogue that our activities not be tarnished by the false invocation of religious and constitutional freedom to justify violence, threats and fear in an effort to forcefully impose beliefs on others.

A nationwide injunction is particularly important where the victims – which include clergy, their families, their homes and others – are lawful individuals or businesses engaging in the free exercise of religious expression, and when law enforcement cannot or does not protect those who, like the clinics and women here are "especially vulnerable to the threat of mob violence." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 349 (1993) (O'Connor, J., dissenting).

Amici are interested in a final and prompt resolution of this case because religious organizations, their members and others who disagree with petitioners' beliefs should be permitted to seek protection from the violent behavior aimed at suppressing the free exercise of their legal, religious and constitutional freedoms. Consequently, *amici* file this brief in opposition to petitioners, urging that federal district courts should be permitted to issue injunctive relief under the Hobbs Act and RICO to prevent and restrain these continued acts of violence no matter where they may occur.

SUMMARY OF ARGUMENT

The decisions of the lower courts demonstrate that petitioners' nationwide pattern of crimes included violent assaults and physical attacks on patients, doctors, clinic staff, and police, plus destruction of medical equipment, supplies, and other property, committed for the purpose of

obtaining control over the property of women's health centers and their patients. *See National Organization For Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), *National Organization For Women, Inc. v. Scheidler*, 91 Fed.Appx. 510, 2004 WL 375995 (7th Cir. 2004).

These violent crimes have but one purpose: to hinder a woman's free choice to decide if and when to have children according to the dictates of her conscience and religious beliefs. It is not enough for petitioners and those like them to peacefully assemble and debate the social and religious issues of abortion. They act in organized groups to overwhelm local police forces, blockade the entrances to clinics, and commit criminal acts of violence on those who have different religious beliefs. *Id.*

The lower courts applied federal law to prohibit petitioners' violent efforts to impose their views on others, yet allowed petitioners to peacefully assemble, speak and pray in furtherance of their beliefs. Those courts, in our view, struck the proper balance between protecting the constitutional freedom to peacefully advocate social change while prohibiting the violent curtailing of the freedom of others to act differently and to adhere to different beliefs.

Campaigns of threats and violence against women and others who may seek or convey information about reproductive choice are not limited to health clinics. What happened to the respondents to compel them to commence the underlying class action almost twenty years ago is also compelling today. Following Congress' attempt to craft a response (the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994)) that homes in on the criminal activity at health care clinics, some protesters have altered their conduct by engaging in violent activity at places

other than clinics. The homes of clergy, private residences and other places have been reported as targets in order to circumvent injunctions and other penalties under the Freedom of Access to Clinic Entrances Act.

Clergy members, their families and others who exercise their First Amendment right to religious expression, and who seek to convey information about reproductive choice, have also fallen victim to actual and threatened force, violence and fear. Indeed, notwithstanding petitioners' contention that they abandoned their wrongful conduct after enactment of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, the trial court found that petitioners pattern of crimes had continued unabated and that petitioners continue to cross state lines to promote and carry out their crimes in new jurisdictions. The district court therefore concluded that an injunction was necessary. *See National Organization For Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001); *National Organization For Women, Inc. v. Scheidler*, 91 Fed.Appx. 510, 2004 WL 375995 (7th Cir. 2004).

In crafting its injunction against petitioners, the district court was careful not to impose liability on constitutionally protected speech and other activity. The critical distinction between petitioners' constitutionally protected rights of speech, assembly and religion and their unlawful acts and threats of violence was carefully tailored in the nationwide injunction entered by the district court to implement the jury verdict. *National Organization For Women, Inc. v. Scheidler*, 267 F.3d 687, 705 (7th Cir. 2001).

However, during the twenty years that this case has been litigated, petitioners have demonstrated that they will continue to engage in their violent actions in order to

interfere with those who have different religious beliefs and may seek or convey information about reproductive choice. They have proven that they will attempt to circumvent established law and the enactment of new laws to avoid a national ban on their violent acts.

These continued, coordinated and planned nationwide acts and threats of physical violence are why *amici* believe that injunctive relief should be available to the district courts in order to finally prevent petitioners' violent acts and their continued attempts to stifle the free exercise of religion. Petitioners' violent acts and the injunction issued by the district court are entirely supported by the Hobbs Act, 18 U.S.C. § 1951(a), and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, and the legislative history surrounding the adoption of these statutes.

ARGUMENT

I. The Hobbs Act Prohibits Petitioners' Nationwide Pattern of Violent Efforts to Impose Their Views on Others.

While the Hobbs Act is susceptible to two interpretations, the three-way reading is far more sensible.[3] Petitioners' contention that 18 U.S.C. § 1951(a) only forbids committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion is

[3] Respondents' interpretation of 18 U.S.C. § 1951(a) is referred to as the "three-way" interpretation, as it forbids robbery, extortion and physical violence. Petitioners' interpretation is referred to as the "two-way" interpretation, as it forbids only robbery and extortion.

contrary to the letter, intent and spirit of the Hobbs Act. Or, as Professor Craig Bradley put it so succinctly in his 1994 Supreme Court Review article, "this [two-way] interpretation makes no sense!" Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment,* 1994 SUP. CT. REV. 129, 142 (1994).

As respondents proved at trial, petitioners' chosen tactic was a form of forcible invasions and blockades that petitioners called "blitzes." Abundant evidence showed that petitioners and their members regularly assaulted clinic personnel and patients: petitioners beat on their cars, hit and clawed them, choked them, threw them to the ground, shoved and elbowed them, and slammed them against buildings. *See National Organization For Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001); *National Organization For Women, Inc. v. Scheidler*, 91 Fed.Appx. 510, 2004 WL 375995 (7th Cir. 2004).

Religious organizations, their clergy and members should be free to convey information about reproductive choice without fear of violence or unlawful infringement of their free exercise of religion. Petitioners' conduct is just the sort that the Hobbs Act forbids. These violent assaults and physical attacks are indistinguishable from crimes carried out by terrorist groups with no economic motive. The confusing reading of the Hobbs Act offered by petitioners – that the statute does not forbid threats or acts of physical violence – threatens all Americans engaging in the free exercise of religious expression and legal rights.

A. The Plain Language of the Hobbs Act Prohibits Petitioners' Violent Acts.

The entire text of the Hobbs Act can only be fairly read to include forbidding robbery, extortion and physical violence. The Hobbs Act defines "robbery" and "extortion" by reference to acts involving "actual or threatened force [or] violence. . . . " *Compare* 18 U.S.C. § 1951(b)(1) *with* 18 U.S.C. § 1951(b)(2). Substantially equivalent language used in the text of subsection 1951(a) with respect to any other acts involving physical violence ("or commits or threatens *physical violence* to any person or property"), does not refer to "robbery" and "extortion," because both acts are already defined as acts involving "actual or threatened force [or] violence." *Compare* 18 U.S.C. § 1951(a) *with* 18 U.S.C. § 1951(b)(1) and 1951(b)(2).

This Court has held repeatedly that "courts must presume that a legislature says in a statute what it means and means in a statute what it says. . . . " *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). As such, the restrictive interpretation proposed by petitioners would make subsection 1951(a) superfluous. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) ("Statutory interpretations that 'render superfluous other provisions in the same enactment' are strongly disfavored.") (quoting *Freytag v. Commissioner*, 501 U.S. 868, 877 (1991)).

Likewise, this Court observed that, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible

with the rest of the law." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (citing *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986)); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-308 (1961).

The seeming ambiguity produced by the petitioners' proposed restrictive interpretation limiting the Hobbs Act to "robbery" and "extortion" when section 1951(a) is read in isolation from the definitions of "robbery" and "extortion" contained in subsection (b), disappears when subsections 1951(a) and 1951(b) are read in unison with one another, using the defined terms "robbery" and "extortion." *See Scheidler*, 396 F.3d at 815-16 (holding that "[a]t a minimum, it is hard to argue with the proposition that any reading of the Hobbs Act ought to take into account the statute as a whole. That means that the language of § 1951(a) should be understood in light of the definitions provided by § 1951(b).").

B. The Supreme Court Has Already Supported the Three-Way Interpretation of the Hobbs Act.

In 1960, the Supreme Court declared, in *Stirone v. United States*, 361 U.S. 212 (1960), that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress had to punish interference with interstate commerce by extortion, robbery *or physical violence*." *Id.* at 215 (emphasis added).

In 2003, in this very case, this Court reaffirmed its adherence to the broader interpretation of the Hobbs Act.

In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003) (NOW II), this Court observed that "the words of the Hobbs Act 'do not lend themselves to restrictive interpretation' because they 'manifes[t] . . . a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery *or physical violence*.'" *Id.* at 408 (citing *U.S. v. Culbert*, 435 U.S. 371, 373 (1978) and quoting *Stirone*, 361 U.S. at 215) (emphasis added).

Moreover, notwithstanding its current position, for over thirty years the United States has also adhered to the broader interpretation of the Hobbs Act.[4] In *U.S. v. Franks*, 511 F.2d 25 (6th Cir. 1975) and, as recently as 1999, in *U.S. v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999), the United States argued that "the Hobbs Act criminalizes any act of violence to person or property that has an effect on commerce, even if the alleged violent act had no connection to any executed or planned robbery or extortion." *Yankowski*, 184 F.3d at 1072. *Accord Franks*, 511 F.2d at 31 ("The government counters that it need neither allege

---

[4] While the Ninth Circuit in *U.S. v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999) and the Sixth Circuit in *U.S. v. Franks*, 511 F.2d 25 (6th Cir. 1975) concluded that the Hobbs Act applies only to "extortion" and "robbery," the United States clearly took the position in support of the broader three-way interpretation of the Hobbs Act in those cases. Such position, taken as late as 1999, seems at odds with the United States' *amicus* brief herein, particularly where it argues that "[i]n light of the text and history of the Hobbs Act, *it has long been the view of the United States* that the Hobbs Act proscribes violent acts only when linked to a planned or intended robbery or extortion." Brief for the United States as *Amicus Curiae* at 18, *Scheidler v. Nat'l Organization of Women* (Nos. 04-1244 and 04-1352). *Cf. Yankowski*, 184 F.3d at 1072 and *Franks*, 511 F.2d at 31. *See Scheidler*, 396 F.3d at 815.

nor prove extortion if it alleges and proves physical violence affecting commerce.").

C. Congress Intended that the Hobbs Act Would Forbid Petitioners' Acts of Violence.

Congress intended that the Hobbs Act would forbid threatening or committing physical violence in furtherance of a plan to "obstruct, delay or affect commerce." The Hobbs Act was first proposed during World War II, and "a major concern of Congress at that time was that interstate shipments of commodities and war material not be interfered with." Bradley, *supra*, at 143. Thus, "Nazi saboteurs who blew up interstate shipments or delayed them through bomb threats . . . would be guilty under this reading of the statute. So too would anti-abortion protestors who, with no economic motive, interfered by threats or violence with the abortion business. . . ." Bradley, *supra*, at 143-44.

If, as petitioners argue, Congress intended to limit the applicability of subsection 1951(a) only to "robbery" and "extortion," then Congress would not have used the descriptive language "or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section" at all. Indeed, "under this reading, the 'physical violence' clause would be less inclusive, and hence would add nothing, to the preceding 'robbery' and 'extortion' clauses." Bradley, *supra*, at 142-43.

Professor Bradley explains that "[o]ne who commits violence in furtherance of a plan to commit robbery or extortion has either committed, attempted, or conspired to

commit robbery or extortion and thus has violated the first clause, rendering the third clause nugatory." Bradley, *supra*, at 142-43. Had Congress intended the Hobbs Act to apply only to robbery and extortion, it could have simply declared that, whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion, or attempts or conspires so to do in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Such restrictive language would have been free of ambiguity, would have made full use of the defined terms "extortion" and "robbery," and would have left no doubt whatsoever that Congress intended section 1951(a) to apply only to acts constituting "robbery" and "extortion." While Congress could have drafted section 1951(a) narrowly to apply only to "extortion" and "robbery," Congress purposefully inserted the language that could only apply to undefined acts of violence, other than the defined crimes of "extortion" and "robbery." *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Petitioners' coordinated and planned nationwide acts and threats of physical violence, which stifle the free exercise of religious expression and other legal rights, is just the sort that the Hobbs Act forbids. Petitioners' violent acts are entirely supported by the letter and intent of the Hobbs Act.

From our perspective, while petitioners should be free to peacefully debate the issue of abortion, the Hobbs Act – its text, relevant Supreme Court precedent, and Congressional

intent – prohibit petitioners' violent actions as proven against them at trial.

II. RICO Authorizes District Courts To Grant Injunctive Relief In Private Lawsuits.

As explained above, petitioners' acts of violence and threats of violence violate the Hobbs Act, and thus serve as a predicate for injunctive relief under RICO. Injunctive relief for private parties under RICO is not only permitted under the plain language and structure of RICO, it is also essential to prevent attacks not only on health clinics, but on all persons and entities targeted because of their religious beliefs. Without nationwide injunctive relief under RICO, petitioners will be able to continue their violent acts simply by moving from state to state. Such injunctive relief is therefore a necessity to prevent petitioners from using violent efforts to impose their religious views on others.

A. RICO's Plain Language and Structure Authorize Injunctive Relief to Private Plaintiffs.

RICO's civil remedy provisions are contained in three subsections. 18 U.S.C. § 1964. The first, subsection (a), authorizes the district courts "to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders." It goes on to delineate a non-exclusive list of permissible forms of equitable relief.

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to:

> ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Subsection (a) neither identifies nor limits the RICO plaintiffs who may receive injunctive relief, thus creating an equitable right that is coextensive with the right to sue to enforce the substantive prohibitions of section 1962 of RICO. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998).

The parties who may sue as RICO plaintiffs are identified in subsections (b) and (c) of section 1964. Section 1964(b) authorizes the government to "institute proceedings under this section," adding that the government may request preliminary injunctive relief and accept performance bonds from the defendants. Subsection (c) authorizes private persons who are injured in their "business or property by reason of a violation of section 1962" to "sue," adding that they shall recover treble damages and their costs, including reasonable attorney fees.

Subsections (b) and (c) of section 1964 do not expressly reference subsection (a). Neither subsection expressly limits the scope of subsection (a) nor expressly states that some RICO plaintiffs but not others may sue to enforce section 1964's equitable provisions. As a result, the statute authorizes private plaintiffs to sue for the equitable relief

described in section 1964(a) for the same reason that the government is so authorized: the natural reading of section 1964 as a whole is that subsection (a) applies with equal force to all of the parties identified in the subsections following it. *See Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984), where the court denied defendants' motion to strike plaintiff's claim for equitable relief holding that section 1964(a) applies equally to private plaintiffs and the government.

To hold otherwise, this Court would need to amend subsection (b) by, in effect, adding the word "only" into its text, making the lead sentence read "[Only] the Attorney General may institute proceedings under this section." That concoction of exclusivity would improperly change the plain meaning of the sentence as written. *See In re Managed Care Litigation*, 298 F. Supp. 2d 1259 (S.D. Fla. 2003) (holding that injunctive relief is available to private civil RICO plaintiffs based on the plain language of the statute, finding that where the plain meaning of the statute was clear, it was neither necessary nor appropriate to consult the legislative history). Thus, under the language and structure of the statute, injunctive relief is available to respondents to prevent the further violent curtailing of their freedom to adhere to different beliefs than petitioners.

B. RICO Does Not Expressly Preclude An Award of Injunctive Relief to Private Plaintiffs.

In *Franklin v. Gwinnett County Pub. Sch.*, this Court reiterated the long-standing presumption that "all appropriate remedies" are available under a statute that provides a private right of action "unless Congress has

expressly indicated otherwise." 503 U.S. 60, 66 (1992) (emphasis added). "[A]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979).

Nothing in the language of RICO can be fairly read to prohibit federal district courts from using their historical authority to grant equitable relief to private plaintiffs when appropriate. *See Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 244 (S.D.N.Y. 2002) (concluding that RICO "nowhere expressly denies courts this [injunctive] power in private civil actions, and thus the normal presumption favoring a court's retention of all powers granted by the Judiciary Act of 1789 prevails"); *Aetna Cas. & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910 (E.D.N.Y. 1983), *aff'd*, 730 F.2d 905 (2d Cir. 1984) (noting that there is no "clear indication that Congress intended to deprive the district court of its traditional equity jurisdiction to grant preliminary injunctive relief to a plaintiff who could show irreparable injury resulting from a defendant's alleged violation of § 1962"). That interpretation of RICO is correct. To hold otherwise would afford those victims of violence targeted for their religious beliefs no legal means of preventing similar acts of violence from occurring in the future.

Section 1964(a)'s failure to identify the parties that may seek equitable relief does not exclude any party from its scope even inferentially, let alone expressly. As noted above, subsection (b)'s authorization of governmental equitable proceedings is not exclusive on its face. And subsection (c)'s grant of a treble damage remedy to private parties is hardly an express indication that those parties

are precluded from obtaining equitable relief. Section 1964, in short, does not affect the district courts' traditional equitable powers.

This conclusion is reinforced by Congress' directive that RICO should be "liberally construed to effectuate its remedial purpose." Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970). As this Court has stressed, "if Congress' liberal-construction mandate is to be applied anywhere, it is in section 1964, where RICO's remedial purposes are most evident." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 n.10 (1985). Any ambiguity in the text is therefore clarified by the Congressional mandate to liberally construe section 1964 to prevent and restrain RICO violations. Injunctive relief was properly granted to respondents so as to "make good the wrong done," and enjoin petitioners from further attempts to use violence to impose their views upon others. *See Franklin*, 503 U.S. at 66 and quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946).

C. Analysis of the Clayton Act's Equitable Relief Provisions Does Not Support a Different Result.

Comparing the similar language of RICO section 1964(c)[5] and section 4 of the Clayton Act,[6] does not compel

---

[5] "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c), as enacted (1970).

[6] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him

(Continued on following page)

a finding that private plaintiffs are precluded from seeking equitable relief under section 1964(c). There is no question but that RICO section 1964(c), by itself, does not address the question of whether equitable relief may be awarded to private plaintiffs. But, when subsection (c) is read in conjunction with section 1964(a), those two linked provisions authorize private plaintiffs to sue for injunctive relief. The Clayton Act reaches the same result by a different route.

Although section 4 of the Clayton Act does not permit private equitable relief, another section of the Act, section 16, does. At the time of RICO's enactment, section 16 provided that:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws. . . .

15 U.S.C. § 26 (1970). Similarly, the government is authorized to seek equitable relief in another self-contained Clayton Act provision, section 15, which provided at the time of RICO's enactment that:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

15 U.S.C. § 25 (1970).

---

sustained, and the cost of the suit, including a reasonable attorney's fee." 15 U.S.C. § 15, as enacted (1970).

In sum, the Clayton Act authorizes governmental and private equitable relief in two separate statutory provisions, section 15 and section 16, with each separate section granting equitable rights and expressly identifying the parties which may enforce those rights. RICO authorizes equitable relief in one subsection of section 1964, subsection (a), and then identifies the parties who may sue for that relief in the following two subsections, (b) and (c). While structurally different, both enactments allow all plaintiffs, private and governmental, to sue for equitable relief.

D. Public Policy Supports the Seventh Circuit's Holding that RICO Authorizes Injunctive Relief to Private Parties.

Should the district court's nationwide injunction be overturned, the inevitable result will be a multiplicity of costly, inefficient lawsuits, jurisdiction by jurisdiction, with repetitive challenges to the same illegal conduct by numerous plaintiffs against the same defendants. Despite the enactment of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, without a nationwide injunction petitioners would legally be able to cross state lines to avoid an injunction in one jurisdiction while continuing to engage in the identical illegal conduct at different clinics or places of religious worship in different jurisdictions. *See National Organization for Women, Inc. v. Scheidler*, No. 86-C-7888, 1999 WL 571010, at *14-15 (N.D. Ill. Jul. 28, 1999) (discussing how petitioners are avoiding injunctions under the Freedom of Access to Clinic Entrances Act). Further, there is currently no protection against illegal nationwide plans of violence for those who have been targeted because of their religious beliefs at

places other than health clinics or places of religious worship. A nationwide injunction is therefore necessary to effectively deter such plans to incite violence that infringe upon civil and religious liberties.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

DAVID J. PFEFFER
IGOR M. TSIBELMAN
ARENT FOX PLLC
1675 Broadway
New York, NY 10019
(212) 484-3900

DEANNE M. OTTAVIANO*
GRETCHEN A. DIXON
MELISSA D. DROLLER
ARENT FOX PLLC
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 857-6000

* *Counsel of Record*

APPENDIX A

The Religious Coalition for Reproductive Choice

The Religious Coalition for Reproductive Choice ("RCRC") is the national coalition of religious and religiously affiliated organizations with official statements and positions in support of reproductive choice as an aspect of religious freedom.

RCRC was founded as a project of the United Methodist Church Board of Church and Society in 1973 to bring religious organizations together to demonstrate religious support for the new U.S. Supreme Court decision *Roe v. Wade*. Originally named the Religious Coalition for Abortion Rights ("RCAR"), RCAR expanded its mission in 1993 to include family planning, sexuality education, and health and human services and accordingly changed its name to the Religious Coalition for Reproductive Choice. RCRC is an educational and advocacy organization, incorporated as Internal Revenue Code sections 501(c)3 and 501(c)4 organizations and headquartered in Washington, D.C. Membership is by application only, and organizations meeting criteria for membership are admitted by vote of RCRC's governing body. Member organizations are listed below. Together these organizations have more than 20 million members in the United States. RCRC also includes affiliates in 25 states, a national Clergy for Choice Network with about 2,000 members of all faiths, chapters on campuses and seminaries, and the National Black Church Initiative, guided by an advisory group of prominent African American religious leaders.

RCRC, its member organizations, members of its clergy network, and affiliated congregations and seminaries have been subjected to violence, threats and fear because of

their religiously grounded beliefs in favor of reproductive choice. Our interest in this case is to protect clergy, congregations, and seminaries, as well as individual women, from unlawful harassment, violent behavior and fear intended to stifle their free exercise of religion. We believe that clergy must be free to counsel women facing problem pregnancies without fear of intimidation. Clergy and lay religious leaders must also be free to speak about reproductive choice, including abortion, from the pulpit without fear of harassment. Without federal protection, clergy members and their families face situations like the one documented below, in an essay by Douglas Buchanan of Wooster, Ohio, whose father was a Presbyterian minister in a congregation that supported a local Planned Parenthood clinic:

> I didn't know who the angry people were who stood outside our church that Sunday, yelling and beating on the glass doors. My parents whisked me away before I could read the signs they held or see the pictures that emblazoned on them. but not before I could feel the wave of hatred seep through the cracks in the doorway . . .
>
> A few years later, they would jump out from under tables at an award ceremony for my father, a Presbyterian minister – a ceremony that also commemorated *Roe v. Wade* – and started yelling. . . .
>
> But now, that Sunday, they knew where we lived, and they waited outside our house, pacing and stalking back and forth on the sidewalk with their signs and hateful presence, walking around the house, looking in the windows and banging on the door. Their so-called 'Christian Love' seemed to extend no further than those that

> thought like they did and agreed with their ideals. Anyone else, even a family of a minister, even two small brothers, eight and three years old, were viable targets for their hate.
>
> My parents called the police, who said there was nothing we could do as long as they stayed on the sidewalk. I remember huddling behind a chair in the corner of a room, pocketknife at the ready, determined to defend my home if they burst in.

(Faith & Choices, Winter 2004, Religious Coalition for Reproductive Choice).

We believe that a nationwide injunction is particularly important where the victims – which include clergy, their families, their homes and other people and places – are lawful individuals or businesses engaging in the free exercise of religious expression. We seek a final and prompt decision of this case because the religious organizations that are associated with RCRC should be permitted to seek protection from the violent behavior aimed at suppressing the free exercise of their legal, religious and constitutional freedoms.

Member Organizations of RCRC (as of October 2005)

Episcopal Church in the United States of America
Episcopal Urban Caucus
Episcopal Women's Caucus
Presbyterian Church (USA) Washington Office
Presbyterian Church (USA) Women's Ministries
Presbyterians Affirming Reproductive Options
United Church of Christ Justice and Witness Ministries
General Board of Church and Society, United Methodist Church

General Board of Global Ministries, Women's Division, United Methodist Church
Catholics for a Free Choice
Church of the Brethren Women's Caucus
Disciples for Choice
Lutheran Women's Caucus
Methodist Federation for Social Action
YWCA of the USA
Rabbinical Assembly (Conservative Judaism)
United Synagogue of Conservative Judaism
Women's League for Conservative Judaism
Society for Humanistic Judaism
Jewish Reconstructionist Federation
Central Conference of American Rabbis (Reform Judaism)
Women's Rabbinic Network of the Central Conference of American Rabbis
North American Federation of Temple Youth
Union for Reform Judaism
Women of Reform Judaism, The Federation of Temple Sisterhoods
American Jewish Committee
American Jewish Congress
Anti-Defamation League of B'nai B'rith
Hadassah, WZOA
Jewish Women International
NA'AMAT USA
National Council of Jewish Women
Women's American ORT
American Humanist Association
American Ethical Union
National Service Conference of the American Ethical Union
Unitarian Universalist Association of Congregations
Unitarian Universalist Women's Federation
Young Religious Unitarian Universalists

American Humanist Association

The American Humanist Association ("AHA") is the oldest and largest humanist organization in the nation, dedicated to ensuring a voice for those with a positive, nontheistic outlook. The mission of the AHA is to promote the spread of humanism, raise public awareness and acceptance of humanism, and encourage the continued refinement of the humanist philosophy. One of humanism's core values is to ensure reproductive freedom. The AHA has been working to advance reproductive rights for over forty years.

Americans for Religious Liberty

Americans for Religious Liberty ("ARL") is an ecumenical nationwide nonprofit educational organization, founded in 1982, dedicated to defending and advancing freedom of conscience, religious freedom, and church-state separation. ARL has been an *amicus* in a number of cases before the Supreme Court, including cases on reproductive rights. ARL's consistent position has been that the First Amendment and other sections of the Constitution protect the right of every woman to follow her own conscience in dealing with a problem pregnancy.

Disciples for Choice

Disciples for Choice is an organization of members of the Christian Church (Disciples of Christ) and friends of the cause of reproductive choice. The stance of responsible freedom is supported historically by General Assembly Resolution #24 (San Antonio, 1975), which reads in part: "Therefore be it resolved that the General Assembly . . . [r]espect[s] differences in religious belief concerning abortion and oppose[s] in accord with the principle of religious liberty, any attempt to legislate a specific religious opinion or belief concerning abortion upon all Americans. . . ."

Unitarian Universalist Association
The Unitarian Universalist Association (the "Association") is a religious association of more than 1,000 congregations in the United States, Canada and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom. Most relevant to the case at bar are the Association's resolutions specifically supporting the fundamental right of individual choice in reproductive matters and the right of a female to have an abortion at her own request upon medical/social consultation of her own choosing.

United Church of Christ Justice and Witness Ministries

Nos. 04-1244 and 04-1352

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL., PETITIONERS

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

OPERATION RESCUE, PETITIONER

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record

JOHN C. RICHTER
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

LISA S. BLATT
Assistant to the Solicitor General

KATHLEEN A. FELTON
FRANK MARINE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the Hobbs Act, 18 U.S.C. 1951, prohibits acts or threats of physical violence that obstruct, delay, or affect interstate commerce but have no connection to either robbery or extortion.

2. Whether private litigants may obtain equitable relief in a civil RICO action under 18 U.S.C. 1964.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statutory provisions involved 2
Statement 2
Summary of argument 6
Argument:

I. The Hobbs Act does not criminalize acts or threats of physical violence that are not linked to a planned or intended robbery or extortion 7
   A. The text of the Hobbs Act requires the prohibited physical violence to be in furtherance of a planned or intended robbery or extortion 8
   B. The Hobbs Act's history confirms that the Hobbs Act does not contain a free-standing prohibition on violence that obstructs, delays, or affects commerce 13
   C. Criminal liability has never been imposed under the Hobbs Act for violence independent of an intended robbery or extortion 18

II. RICO does not authorize a private cause of action for injunctive relief 19
   A. RICO's text and structure vest exclusive authority in the Attorney General to sue for equitable relief 19

Table of Contents—Continued: Page

B. A comparison with the antitrust laws shows that Congress did not create a private injunctive action 22
C. Policy considerations do not support a private right to injunctive relief under RICO 27
Conclusion 29

TABLE OF AUTHORITIES

Cases:

Agency Holding Corp. v. *Malley-Duff & Assoc.*, 483 U.S. 143 (1987) 26, 27
Bates v. *United States*, 522 U.S. 23 (1997) 13
California v. *American Stores Co.*, 495 U.S. 271 (1990) 23, 28
Califano v. *Yamasaki*, 442 U.S. 682 (1979) 24
Caminetti v. *United States*, 242 U.S. 470 (1917) 13
Carter v. *United States*, 530 U.S. 255 (2000) 13
Chickasaw Nation v. *United States*, 534 U.S. 84 (2001) 13
D.R. Wilder Mfg. Co. v. *Corn Prods. Ref. Co.*, 236 U.S. 165 (1915) 23, 24, 28
Evans v. *United States*, 504 U.S. 255 (1992) 14
FCC v. *Pacifica Found.*, 438 U.S. 726 (1978) 17
Farmers' & Mechs. Nat'l Bank v. *Dearing*, 91 U.S. 29 (1875) 24
Geddes v. *Anaconda Copper Mining Co.*, 254 U.S. 590 (1921) 23

Cases—Continued: Page

General Inv. Co. v. *Lake Shore & Mich. S. Ry.*, 260 U.S. 261 (1922) 23, 24
Holmes v. *Securities Investor Prot. Corp.*, 503 U.S. 258 (1992) 23, 25, 26
Laime v. *United States Tr.*, 540 U.S. 526 (2004) 13
Minnesota v. *Northern Sec. Co.*, 194 U.S. 48 (1904) 23
Mitchell v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) 24
Muniz v. *Hoffman*, 422 U.S. 468 (1975) 17
National Org. for Women, Inc. v. *Scheidler*, 510 U.S. 249 (1994) 2, 3
Paine Lumber Co. v. *Neal*, 244 U.S. 459 (1917) 23
Pennsylvania Dep't of Corrs. v. *Yeskey*, 524 U.S. 206 (1998) 13
Pfizer Inc. v. *India*, 434 U.S. 308 (1978) 23
Porter v. *Warner Holding, Co.*, 328 U.S. 395 (1946) 24
Religious Tech. Ctr. v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987) 21, 27
Russello v. *United States*, 464 U.S. 16 (1984) 28
Salinas v. *United States*, 522 U.S. 52 (1997) 13
Scheidler v. *National Org. for Women, Inc.*, 537 U.S. 393 (2003) 1, 2, 3, 4, 5, 9, 10, 14, 16

Cases—Continued: Page

Sedima, S.P.R.I. v. *Imrex Co.*, 473 U.S. 479 (1985) 20, 26
Stirone v. *United States*, 361 U.S. 212 (1960) 9
Texas Indus., Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) 23
Trainmen v. *Baltimore & Ohio R.R.*, 331 U.S. 519 (1947) 13
United States v. *Bonanno*, 879 F.2d 20 (2d Cir. 1989) 20
United States v. *Cooper Corp.*, 312 U.S. 600 (1941) 24
United States v. *Culbert*, 435 U.S. 371 (1978) 9, 14, 15, 16
United States v. *Dworkin*, 855 F.2d 12 (1st Cir. 1988) 11
United States v. *Enmons*, 410 U.S. 396 (1973) 10, 13, 14, 19
United States v. *Franks*, 511 F.2d 25 (6th Cir.), cert. denied, 422 U.S. 1042 and 1048 (1975) 11, 19
United States v. *Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005), petition for cert. pending, No. 05-92 (filed July 18, 2005) 25
United States v. *Teamsters*, 315 U.S. 521 (1942) 14
United States v. *Turkette*, 452 U.S. 576 (1981) 28
United States v. *Wells*, 519 U.S. 482 (1997) 17
United States v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999) 19

Cases—Continued: Page

Whitman v. *American Trucking Ass'n*, 531 U.S. 457 (2001) 13

Statutes:

Act of June 25, 1948, ch. 645, 62 Stat. 683:
§ 1:
Pt. I:
§ 1951:
62 Stat. 793 ..... 6, 17
62 Stat. 793-794 ..... 16, 17
§ 21, 62 Stat. 866 17
Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979:
§ 2, 48 Stat. 979 ..... 5, 14
§ 2(a), 48 Stat. 980 14
§ 2(b), 48 Stat. 980 14
§ 2(c), 48 Stat. 980 ..... 12, 14
Clayton Act, 15 U.S.C. 15 *et seq.*:
§ 4, 15 U.S.C. 15(a) 7
§ 16, 15 U.S.C. 26 ..... 7, 23, 25
Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 3, 108 Stat. 694 28
Hobbs Anti-Racketeering Act of 1946, ch. 537, 60 Stat. 420 ..... 5, 12, 14
§ 1, 60 Stat. 420 15
§ 2, 60 Stat. 420 15
§ 3, 60 Stat. 420 15
§ 4, 60 Stat. 420 15
§ 5, 60 Stat. 420 15

Statutes—Continued: Page

Organized Crime Control Act of 1990, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 27
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*:
18 U.S.C. 1962(c) 3
18 U.S.C. 1964 ..... 1, 2, 6, 7, 19, 25, 27
18 U.S.C. 1964(a) 6, 7, 19, 20, 21, 22, 24, 25
18 U.S.C. 1964(b) 6, 19, 20, 21, 22, 25
18 U.S.C. 1964(c) 2, 3, 6, 7, 20, 21, 22, 25
Sherman Act, ch. 647, 26 Stat. 209 6
§ 4, 26 Stat. 209-210 ..... 23, 25
§ 7, 26 Stat. 210 23
Travel Act, 18 U.S.C. 1952 3
18 U.S.C. 248(a) 28
18 U.S.C. 248(c)(1)(B) 28
18 U.S.C. 1951 ..... 1, 2, 3, 5, 6, 18
18 U.S.C. 1951(a) 5, 7, 8, 9, 13
18 U.S.C. 1951(b)(1) 9
18 U.S.C. 1951(b)(2) 9

Miscellaneous:

89 Cong. Rec. 3217 (1943) 16
91 Cong. Rec. (1945):
p. 11,900 14
p. 11,912 16
116 Cong. Rec. (1970):
p. 27,739 26
p. 35,227 26

Miscellaneous—Continued: Page

p. 35,228 26
p. 35,346 26
Department of Justice:
Criminal Resource Manual (1997) 19
Handbook for Prosecution of Racketeers (Apr. 30, 1965) 18
10 *United States Attorney's Manual* (May 8, 1984) 18
H.R. Rep. No. 238, 79th Cong., 1st Sess. (1945) 15
H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947) 6, 16, 17
S. Rep. No. 1516, 79th Cong., 2d Sess. (1946) ... 15, 16
S. Rep. No. 1620, 80th Cong., 2d Sess. (1948) 17
Herbert Wechsler et al., *The Treatment of Inchocte Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 Colum. L. Rev. 957 (1961) 11

In the Supreme Court of the United States

No. 04-1244

JOSEPH SCHEIDLER, ET AL., PETITIONERS

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

No. 04-1352

OPERATION RESCUE, PETITIONER

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This Court granted certiorari to review the court of appeals' decision, following this Court's ruling in *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), to remand this case to the trial court to determine whether petitioners' four acts or threats of physical violence could constitute a violation of the Hobbs Anti-Racketeering Act (Hobbs Act), 18 U.S.C. 1951, or could support a nationwide injunction under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964. The United States brings criminal prosecutions under the Hobbs Act as well as criminal and civil RICO cases that rely on Hobbs Act viola-

tions as RICO predicate acts. It has long been the view of the United States that the Hobbs Act criminalizes physical violence only when that conduct is in furtherance of an intended robbery or extortion. See pp. 18-19, *infra*. The RICO statute authorizes the Attorney General of the United States to bring civil suits for equitable relief. The court of appeals' holding that private civil RICO plaintiffs may also seek such relief could adversely affect the United States' ability to obtain equitable relief such as disgorgement when both private parties and the government seek such relief for the same conduct.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Hobbs Act, 18 U.S.C. 1951, and RICO, 18 U.S.C. 1964, are set forth in an appendix to this brief. App., *infra*, 8a-10a.

STATEMENT

1. Petitioners are individuals and organizations engaged in pro-life and anti-abortion activities. Respondents are a national nonprofit organization that supports the legal availability of abortions and two clinics that provide medical services, including abortions. See *National Org. for Women, Inc. (NOW)* v. *Scheidler*, 510 U.S. 249, 252 (1994); *Scheidler* v. *NOW*, 537 U.S. 393, 397-398 (2003); 04-1244 Pet. App. 25a-26a. In 1986, respondents brought this RICO action under 18 U.S.C. 1964(c) against petitioners and other defendants alleging, *inter alia*, that they conspired to force the closing of health care clinics that perform abortions, and that they did so through a pattern of racketeering activity that included acts of extortion in violation of the Hobbs Act. In 1991, the district court dismissed the RICO claims for failure to allege that the predicate acts or the RICO enterprise were economically motivated. The court of appeals affirmed that ruling. This Court reversed and remanded, holding that RICO does not require proof that either the alleged racketeering enterprise or the predicate acts of racketeering had an economic motive. *NOW* v. *Scheidler*, 510 U.S. at 257.

2. After trial, the jury returned a verdict for respondents on their substantive RICO claims under Section 1962(c). The jury found that petitioners or persons associated with them had committed 21 violations of the Hobbs Act, 18 U.S.C. 1951; 25 violations of state extortion law; four acts or threats of physical violence to any person or property; 23 violations of the Travel Act, 18 U.S.C. 1952; and 23 attempts to commit one of those crimes. 04-1244 Pet. App. 191a. The jury awarded $31,455.64 to respondent Delaware Women's Health Organization and $54,471.28 to Summit Women's Health Organization. *Id.* at 149a. Those damages were trebled pursuant to 18 U.S.C. 1964(c). 04-1244 Pet. App. 163a n.10. The district court subsequently entered a nationwide injunction that enjoins petitioners, *inter alia*, from wrongfully interfering with the right of clinics to conduct their business. *Id.* at 165a-174a.

The Seventh Circuit affirmed, holding, *inter alia*, that private parties may obtain injunctive relief under RICO. 04-1244 Pet. App. 35a-43a. The court also concluded that petitioners' conduct constituted extortion under the Hobbs Act. The court concluded that a person can violate the Hobbs Act without seeking or receiving money or other property as long as there was a loss to, or interference with the rights of, the victim. *Id.* at 58a-59a.

This Court reversed, holding that petitioners did not obtain or attempt to obtain respondents' property and therefore had not committed extortion under the Hobbs Act. *Scheidler* v. *NOW*, 537 U.S. at 410. The Court also concluded that the jury's finding of predicate acts of violating state extortion laws and violating the Travel Act based on extortionate conduct could not be sustained because petitioners did not commit or attempt to commit extortion. *Ibid.* The Court further explained that "[b]ecause all of the predicate acts sup-

porting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must be reversed," and accordingly that "[w]ithout an underlying RICO violation, the injunction issued * * * must necessarily be vacated." *Id.* at 411. The Court therefore did not address "whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." 537 U.S. at 411.

3. On remand to the court of appeals, respondents argued that the jury's RICO verdict could be sustained based on the four predicate acts consisting of acts or threats of physical violence to any person or property. The court of appeals concluded that this Court in *Scheidler* v. *NOW*, *supra*, had not addressed that issue and that it had not been within the scope of the petition before the Court. The court of appeals then remanded the case to the district court to determine whether the four predicate acts involving acts or threats of physical violence were sufficient to support the nationwide injunction that the trial court had imposed. 04-1244 Pet. App. 28a. In so doing, the court of appeals observed that the trial court "may find it necessary" to decide if the language of the Hobbs Act imposing criminal penalties on any person who "'commits or threatens physical violence to any person or property' constitutes an independent ground for violating the Hobbs Act or, rather, relates back to the grounds of robbery or extortion." *Id.* at 29a.

In denying rehearing, the court of appeals reaffirmed its view that the remand to the district court was appropriate, noting that it had "not, at this point, ruled either implicitly or explicitly on the Hobbs Act issue, for reasons of judicial economy and restraint." 04-1244 Pet. App. 6a-7a. The court of appeals nonetheless suggested that the physical violence clause of the Hobbs Act sets forth an independent, free-standing offense that does not relate back to a robbery or an extortion. *Id.* at 8a-15a.

Judge Manion, joined by Judge Kanne, dissented from the denial of rehearing. 04-1244 Pet. App. 17a-24a. He expressed the view that the court of appeals' order remanding the case to the trial court "directly conflicts with the Supreme Court's opinion" in *Scheidler* v. *NOW*, *supra*, "rests on an impermissible reading of the Hobbs Act," and "unnecessarily revives a case that is already more than eighteen years old." *Id.* at 19a.

SUMMARY OF ARGUMENT

I. The Hobbs Act does not criminalize acts or threats of physical violence independent of a planned or intended robbery or extortion.

A. The text of the Hobbs Act, 18 U.S.C. 1951(a), which imposes penalties on any person who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section," refers back to the robbery, extortion, attempts, and conspiracies that are made criminal offenses under Section 1951(a). The "plan or purpose to do anything in violation of this section" can only refer to robbery and extortion offenses that are defined in the first clause of the statute, together with related attempts and conspiracies. Physical violence without a connection to a planned or intended robbery or extortion is not prohibited under the plain language of the Hobbs Act.

B. The history of Section 1951(a) compels the conclusion that the statute should be read according to its clear text. The Anti-Racketeering Act of 1934, which was the predecessor to the Hobbs Act, did not contain a free-standing prohibition against physical violence in connection with interstate commerce. Ch. 569, § 2, 48 Stat. 979-980. Similarly, the Hobbs Act as originally enacted in 1946 explicitly tied the prohibited physical violence to robbery or extortion. Pub. L. No. 486, ch. 537, 60 Stat. 420. Congress did not intend to create a new stand-alone crime of physical violence when it

passed Section 1951 as part of the 1948 revision of the Criminal Code. Act of June 25, 1948, ch. 645, Pt. I, § 1951, 62 Stat. 793; H.R. Rep. No. 304, 80th Cong., 1st Sess. A131 (1947). Rather, Congress continued to use language that reached physical violence only when in furtherance of a plan or purpose to commit the offense of robbery or extortion or a related attempt or conspiracy.

C. It has been the longstanding view of the United States that the Hobbs Act does not criminalize physical violence independent of a planned or intended robbery or extortion. In the two aberrant prosecutions that departed from that view, the courts rejected the theory of the prosecution. In the 55 years of the Hobbs Act's existence, it appears that no defendant has ever been convicted under the Hobbs Act for physical violence that did not relate to a planned robbery or extortion.

II. RICO does not authorize private parties to seek injunctive relief.

A. Section 1964(a) confers jurisdiction on federal district courts to prevent and restrain RICO violations by granting equitable relief, and Section 1964(b) authorizes only the Attorney General to bring equitable actions and to obtain temporary equitable relief. Section 1964(c) authorizes private parties to sue for treble damages and attorney's fees, but does not authorize private parties to seek any other relief. The structure of those provisions demonstrates that Congress intended to vest the Attorney General with the exclusive authority to bring suit for equitable relief.

B. Congress's intent to withhold from private litigants the right to seek injunctive relief is confirmed by the treatment of the same issue under the antitrust laws. The Sherman Act, 26 Stat. 209-210, created a public equitable action and a private treble damages action. This Court interpreted that Act to foreclose a private injunctive action. Because Section 1964

tracks the language and structure of the Sherman Act in that respect, Congress is presumed to intend that Section 1964 similarly be interpreted not to authorize a private action for injunctive relief.

That presumption is strengthened by comparison of RICO with the Clayton Act. Section 4 of the Clayton Act (15 U.S.C. 15(a)) carries forward the Sherman Act's treble damages provision, but Congress added a new provision, Section 16 of the Clayton Act (15 U.S.C. 26), that expressly authorizes a private action for injunctive relief. The fact that Congress used Section 4 of the Clayton Act as the template for RICO's treble damages provision, 18 U.S.C. 1964(c), without also including a counterpart to Section 16 of the Clayton Act, compels the conclusion that Congress intended no such right under RICO.

C. RICO's purposes are fully consistent with the absence of a private right to seek injunctive relief. Congress authorized courts to grant the full range of equitable relief in civil RICO actions, including such dramatic steps as corporate reorganization and dissolution. 18 U.S.C. 1964(a). Congress logically vested the Attorney General with the exclusive authority to seek such relief.

ARGUMENT

I. THE HOBBS ACT DOES NOT CRIMINALIZE ACTS OR THREATS OF PHYSICAL VIOLENCE THAT ARE NOT LINKED TO A PLANNED OR INTENDED ROBBERY OR EXTORTION

The Hobbs Act imposes criminal punishment on anyone who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. 1951(a). The text and

history of that provision show that the Hobbs Act does not proscribe acts or threats of physical violence except to further a planned or intended robbery or extortion. That conclusion accords with the longstanding view of the United States.

A. The Text Of The Hobbs Act Requires The Prohibited Physical Violence To Be In Furtherance Of A Planned Or Intended Robbery Or Extortion

1. Section 1951(a)'s introductory clause imposes criminal penalties on any person who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, *by robbery or extortion or attempts or conspires so to do*." 18 U.S.C. 1951(a) (emphasis added). No offense is committed under that clause unless the person engages in a robbery or an extortion, or attempts or conspires to commit one of those offenses.

The next clause of Section 1951(a) imposes criminal penalties on any person who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. 1951(a). That text unambiguously refers to the criminal prohibitions in the prior clause. The physical violence clause thus requires that the defendant interfere with commerce by threatening or committing physical violence in furtherance of a robbery or extortion, an attempted robbery or extortion, or a conspiracy to commit robbery or extortion.

In the court of appeals' view, the statute may be read to proscribe acts or threats of violence that are unconnected to any actual or planned robbery or extortion. 04-1244 Pet. App. 8a, 12a-15a. That conclusion, however, ignores the statute's clear requirement that the defendant engage in acts or threats of physical violence "in furtherance of a plan or purpose to do anything *in violation of this section*." As discussed, the Hobbs Act in the preceding clause prohibits only

robbery and extortion, and related attempts and conspiracies. The Act accordingly cannot be read to contain a free-standing and independent offense of physical violence that obstructs, delays, or affects commerce.

2. As the court of appeals observed (04-1244 Pet. App. 9a), the Court in *Stirone* v. *United States*, 361 U.S. 212 (1960), described the Hobbs Act as "speak[ing] in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery *or physical violence*." *Id.* at 215 (emphasis added). The Court made that statement, however, only in the context of discussing the requisite degree of interference with interstate commerce. See *Scheidler* v. *NOW*, 537 U.S. at 408-409. Thus, the reference to "physical violence" in the quoted passage from *Stirone* is properly read as a shorthand reference to the entirety of the statutory text in the latter portion of 18 U.S.C. 1951(a), which makes clear that the "physical violence" targets by the Hobbs Act must be "in furtherance of a plan or purpose to do anything in violation of this section" – *i.e.*, in furtherance of robbery or extortion or an attempt or conspiracy to commit robbery or extortion. Indeed, the Court elsewhere has indicated its understanding that the Hobbs Act prohibits only those acts that are linked to robbery or extortion. See *Scheidler* v. *NOW*, 537 U.S. at 407 (explaining that Congress in the Hobbs Act "prohibited interference with commerce by 'robbery or extortion'"); *United States* v. *Culbert*, 435 U.S. 371, 377 (1978) (describing Act's "specific prohibitions against robbery and extortion").

To read the Hobbs Act as containing an independent prohibition against acts or threats of violence in connection with interstate commerce would effectively overrule two of this Court's decisions interpreting the Hobbs Act, *Scheidler* v. *NOW*, *supra*, and *United States* v. *Enmons*, 410 U.S. 396 (1973). Those decisions involved the meaning of "extortion"

under the Hobbs Act, which requires that the defendant both "obtain[]" property and that the acts or threats of violence be "wrongful." 18 U.S.C. 1951(b)(2); cf. 18 U.S.C. 1951(b)(1) (defining "robbery" to mean the "unlawful taking or obtaining of personal property"). This Court in *Scheidler* v. *NOW*, 537 U.S. at 405, held that petitioners did not "obtain" anything by their acts and threats of violence in their efforts to shut down the abortion clinics. The Court relied in part on the fact that Congress in the Hobbs Act omitted the New York crime of coercion, which does not require defendants to obtain anything but criminalizes violence in their efforts to alter another's conduct. *Id.* at 405-406. Reading the Hobbs Act to criminalize petitioners' violence independent of extortion (and therefore independent of the Act's "obtaining" requirement) would render the Court's holding in *Scheidler* v. *NOW* a dead letter.

The same is true of this Court's decision in *United States* v. *Enmons*, where the Court held that labor union members and officials who committed acts of violence did not commit extortion under the Hobbs Act because their violence in furtherance of legitimate labor activities was not "wrongful." 410 U.S. at 399. In that case, the defendants conspired to obtain for striking employees higher wages and other employment benefits from an employer, a utility company. In furtherance of that conspiracy, the defendant fired high-powered rifles at three company transformers, drained oil from a company transformer, and blew up a company transformer substation. *Id.* at 398. Were the Hobbs Act to penalize violence that affected interstate commerce independent of extortion and its wrongfulness element, the violent activities in furtherance of higher wages and benefits at issue in *Enmons* would have constituted Hobbs Act violations. The highly anomalous results produced by such an interpretation of the Act strongly

suggest that the Hobbs Act does not criminalize conduct that is not linked to robbery or extortion.

3. The court of appeals also suggested that respondents' reading of the Hobbs Act may be necessary to give the physical violence clause independent meaning. The court of appeals reasoned that physical violence in furtherance of a plan or purpose to commit robbery or extortion would presumably "already fall within the definitions of robbery, extortion, or attempts or conspiracies to rob or extort." 04-1244 Pet. App. 14a. But Congress could rationally have enacted the physical violence clause to serve a function similar to that of the inchoate crimes of attempt and conspiracy, *i.e.* "as a basis for preventive intervention by the agencies of law enforcement and for the corrective treatment of persons who reveal that they are disposed to criminality." Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 Colum. L. Rev. 957, 959 (1961). Viewed in that light, the physical violence clause "reach[es] physical violence designed to culminate in extortion [or robbery], even if the scheme aborts prior to extortion [or robbery]." *United States* v. *Franks*, 511 F.2d 25, 31 (6th Cir.), cert. denied, 422 U.S. 1042 (1975).

The clause also may be read to cover physical violence taken in furtherance of robbery or extortion, but where the government has insufficient proof of an attempt or a conspiracy. For instance, a defendant may commit or threaten physical violence to further an extortion conspiracy but the government may lack sufficient proof that the defendant agreed to join the conspiracy. Similarly, Congress may have wanted to reach a defendant who threatened physical violence to further an uncompleted robbery or extortion but there is doubt whether the defendant had yet embarked upon an attempt. Cf. *United States* v. *Dworken*, 855 F.2d 12, 16 (1st Cir. 1988)

("The invariably elusive nature of what constitutes an 'attempt' has long been the subject of judicial chagrin.").

The court of appeals acknowledged that the physical violence clause might cover some conduct that was not already covered under the preceding clause of the Act, but the court thought it "unlikely that Congress included the 'violence' language to capture such a tiny set of academic hypotheticals." 04-1244 Pet. App. 14a. Congress presumably was concerned, however, with ensuring complete coverage under the Act, particularly where robbery or extortion plans turned violent. As the court of appeals acknowledged, when initially enacted in 1946, the Hobbs Act "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." *Id.* at 15a (citing Pub. L. No. 486, 60 Stat. 420 (1946)). The original Act's physical violence clause thus applied to "academic hypotheticals," such as a defendant who threatens or agrees to use physical force to commit a robbery even though such conduct was separately prohibited under the statute's prohibitions of attempts and conspiracies. See pp. 14-15, *infra*.

Congress also employed a similar overlapping phrase that criminalized physical violence in furtherance of an extortion or exaction of property in the Hobbs Act's predecessor, the Anti-Racketeering Act of 1934. Ch. 569, § 2(c), 48 Stat. 979-980; see pp. 13-14, *infra*. Accordingly, the history of the statute shows that Congress separately prohibited physical violence in furtherance of other prohibited acts in order to ensure that the statute captured dangerous conduct even when the underlying substantive offense was not yet complete.

In any event, even were the physical violence clause, as a practical matter, largely superfluous, that fact would not justify the creation of an offense that is not supported by any language in the Hobbs Act. As this Court has explained, "[s]urplusage does not always produce ambiguity and [the

Court's] preference for avoiding surplusage constructions is not absolute." *Lamie* v. *United States Trs.*, 540 U.S. 526, 536 (2004). If the only way to give meaning to such surplusage would be to contradict the plain meaning of the language that Congress used in the statute, the correct course is to "prefer the plain meaning." *Ibid*; accord *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001).[1]

B. The Hobbs Act's History Confirms That The Hobbs Act Does Not Contain A Free-standing Prohibition On Violence That Obstructs, Delays, Or Affects Commerce

The history of the Hobbs Act reflects Congress's intent to proscribe physical violence in connection with interstate commerce only when connected to an actual or intended robbery or extortion. The statutory antecedents to Section 1951(a) expressly linked the prohibited physical violence to robbery or extortion, and there is no evidence that Congress, when it recodified that prohibition in Section 1951(a) in 1948, intended to create a wholly independent prohibition against violence.

---

[1] The same principle precludes any reliance on the title of the Hobbs Act, "Interference with commerce by threats or violence." A statutory title is relevant only to resolve an ambiguous phrase or word in the statute itself. *Carter* v. *United States*, 530 U.S. 255, 267 (2000); *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212 (1998); *Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947). A clear statutory text thus "eliminates the interpretive role of the title." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 484 (2001); accord *Caminetti* v. *United States*, 242 U.S. 470, 490 (1917). Similarly, because the plain text of the Hobbs Act criminalizes violence only when connected to a robbery or extortion, the Court need not resort to the rule of lenity or other principles of statutory construction that might otherwise support a narrow reading of the Hobbs Act. See, *e.g.*, *Salinas* v. *United States*, 522 U.S. 52, 66 (1997); *Bates* v. *United States*, 522 U.S. 23, 32 (1997); cf. *United States* v. *Enmons*, 410 U.S. at 411 (invoking rule of lenity and need to avoid "an unprecedented incursion into the criminal jurisdiction of the States" on the assumption that "the language and history of the Act were less clear").

1. The Hobbs Act's predecessor is Section 2 of the Anti-Racketeering Act of 1934. *Scheidler* v. *NOW*, 537 U.S. at 406; *Evans* v. *United States*, 504 U.S. 255, 261 (1992); *United States* v. *Culbert*, 435 U.S. at 374; *United States* v. *Enmons*, 410 U.S. at 401. The 1934 Act contained no free-standing prohibition on physical violence in connection with interstate commerce. Rather, Section 2(c) of that Act imposed criminal penalties on any person who, in connection with interstate commerce, "[c]ommits or threatens to commit an act of physical violence or physical injury to a person or property *in furtherance of a plan or purpose to violate sections (a) or (b)*." 48 Stat. 980 (emphasis added). Sections 2(a) and (b) in turn applied to any person who engaged in extortion or who, by force, violence, or coercion, obtained or attempted to obtain the payment of money or other valuable consideration "not including * * * the payment of wages by a bona-fide employer to a bona-fide employee." 48 Stat. 980. Accordingly, the 1934 Act made it a crime to engage in violence that affected interstate commerce, but only when the defendant intended to violate the specific prohibitions in the Act on extortion and the exaction of property that did not qualify under the wage exception.

2. In 1946, Congress passed the Hobbs Act as an amendment to the 1934 Act. Pub. L. No. 486, ch. 537, 60 Stat. 420; *Evans* v. *United States*, 504 U.S. at 261. The "narrow purpose" of the Hobbs Act was to overrule this Court's holding in *United States* v. *Teamsters*, 315 U.S. 521 (1942), that the wage exception in the 1934 Act covered union members who used violence to exact wage payments for superfluous and unwanted services. *United States* v. *Enmons*, 410 U.S. at 402; *Scheidler* v. *NOW*, 537 U.S. at 407; *Evans* v. *United States*, 504 U.S. at 262; see also 91 Cong. Rec. 11,900 (1945) (statement of Rep. Hancock) ("This bill is designed simply to prevent both union members and nonunion people from making

use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce. That is all it does."). Thus, "[t]he bill that eventually became the Hobbs Act deleted the exception on which the Court had relied in *Teamsters* and substituted specific prohibitions against robbery and extortion for the Anti-Racketeering Act's language." *United States* v. *Culbert*, 435 U.S. at 377.

Accordingly, when Congress passed the Hobbs Act in 1946, it did not create a novel federal crime of physical violence. Section 1 of the Hobbs Act defined the terms "commerce," "robbery," and "extortion." 60 Stat. 420. Section 2 provided that "[w]hoever in any way or degree, obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, *by robbery or extortion* shall be guilty of a felony." *Ibid.* (emphasis added). The succeeding sections then set forth separate criminal prohibitions covering conspiracies, attempts, and violence in furtherance of a robbery or extortion. Thus, Section 3 applied to "[w]hoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2," and Section 4 applied to "[w]hoever attempts or participates in an attempt to do anything in violation of section 2." *Ibid.* As particularly relevant here, Section 5 applied to "[w]hoever commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of section 2*." *Ibid.* (emphasis added). The Hobbs Act thus unambiguously linked the prohibitions on physical violence to the robbery or extortion that Congress had criminalized under Section 2.

Not surprisingly, there is no mention in the Hobbs Act's history of an intent to create a new federal crime of physical violence in connection with interstate commerce. To the contrary, the history reflects congressional intent to proscribe only robbery and extortion. See, *e.g.*, H.R. Rep. No. 238, 79th

Cong., 1st Sess. 9 (1945) (purpose of the bill is "to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce *by robbery or extortion* as defined in the bill") (emphasis added); S. Rep. No. 1516, 79th Cong., 2d Sess. 1 (1946) (same). As the sponsor of the Act, Representative Hobbs, concisely described the bill that became the Hobbs Act:

> This bill is grounded on the bedrock principle that crime is crime, no matter who commits it; and that robbery is robbery and extortion extortion, whether or not the perpetrator has a union card. It covers whoever in any way or degree interferes with interstate or foreign commerce *by robbery or extortion*.

89 Cong. Rec. 3217 (1943) (emphasis added).

The Court has observed that Congress intended that the Hobbs Act "be clear about what conduct was prohibited." *Scheidler* v. *NOW*, 537 U.S. at 407 (quoting *United States* v. *Culbert*, 435 U.S. at 378). Toward that end, Congress proscribed extortion and robbery since "[e]verybody knows what they mean." *Id.* at 407 n.12 (quoting 91 Cong. Rec. at 11,912 (statement of Rep. Hobbs)). The Hobbs Act likewise "carefully defines its key terms, such as 'robbery,' 'extortion,' and 'commerce.'" *Id.* at 407 (quoting *United States* v. *Culbert*, 435 U.S. at 373). Given the precision with which Congress drafted the Act, "[i]t is inconceivable that, at the same time Congress was so concerned about clearly defining the acts prohibited under the bill," *United States* v. *Culbert*, 435 U.S. at 378, it intended to create a novel crime of physical violence.

3. As part of Congress's 1948 revision of the Criminal Code, the Hobbs Act was revised and codified as Section 1951 of Title 18. Act of June 25, 1948, ch. 645, Pt. I, § 1951, 62 Stat. 793-794. As the court of appeals acknowledged, the 1948 changes to the Hobbs Act "were intended to be formal, stylistic changes." 04-1244 Pet. App. 15a. That point is made explicit by the Reviser's Notes accompanying the 1948 revision, which were intended to "explain[] in detail the revision of each section of the Federal Criminal laws." H.R. Rep. No. 304, 80th Cong., 1st Sess., A1 (1947); *Muniz* v. *Hoffman*, 422 U.S. 454, 469 (1975) ("Revisions in the law were carefully explained in a series of Reviser's Notes printed in the House Report.") (footnote omitted).

As discussed, Congress passed the Hobbs Act as an amendment to the Anti-Racketeering Act of 1934. See p. 14, *supra*. In the 1948 revision of the Criminal Code, Congress repealed the 1934 Act, and revised the Hobbs Act as Section 1951. 62 Stat. 793-794 (enactment of Section 1951), 866 (repeal of Act of June 18, 1934, ch. 569, 48 Stat. 979, 980). The Reviser's Notes thus explain that Section 1951 consolidated the 1934 Act "with changes in phraseology and arrangement necessary to effect consolidation." H.R. Rep. No. 304, *supra*, at A131.

That history is consistent with Congress's general intent in the 1948 revision of the Criminal Code. "[A]s the Senate Report of that legislation made clear, '[t]he original intent of Congress is preserved'" in the 1948 revision. *Muniz* v. *Hoffman*, 422 U.S. at 469 (quoting S. Rep. No. 1620, 80th Cong., 2d Sess. 1 (1948)). Similarly, "[t]he House Report stated that '[r]evision * * * meant the substitution of plain language for awkward terms, reconciliation of conflicting laws, omission of superseded sections, and consolidation of similar provisions.'" *Ibid.* (quoting H.R. Rep. No. 304, *supra*, at 2). Based on that history, this Court has refused to read the 1948 revisions to the Criminal Code as bringing about significant changes without an expression of congressional intent in the text itself. *FCC* v. *Pacifica Found.*, 438 U.S. 726, 738 (1978); *Muniz* v. *Hoffman*, 422 U.S. at 468-469; cf. *United States* v. *Wells*, 519 U.S. 482, 497 (1997) (Reviser's Notes may

not "muddy the ostensibly unambiguous provision of the statute as enacted by Congress"). The history of Section 1951 therefore confirms the conclusion compelled by the plain text: the prohibited physical violence must be linked to an intended robbery or extortion.

C. Criminal Liability Has Never Been Imposed Under The Hobbs Act For Violence Independent Of An Intended Robbery Or Extortion

In light of the text and history of the Hobbs Act, it has long been the view of the United States that the Hobbs Act proscribes physical violence only when linked to a planned or intended robbery or extortion. In examining the bill that became the Hobbs Act, the Attorney General in 1946 described the bill as "making it a Federal offense to interfere with or impede the free flow of interstate commerce *by robbery or extortion*." App., *infra*, 7a (Letter from the Attorney General to Hon. Paul H. Appleby, Acting Director, Bureau of the Budget (June 27, 1946) (emphasis added)). That view subsequently was reflected in official policy statements that guided criminal prosecutions by the United States under the Hobbs Act. A Department of Justice handbook issued in 1965 stated:

> The Hobbs Act requires that the prohibited impact upon commerce be effected by robbery, or extortion. In addition, the act makes a crime of the commission or the threatened commission of "physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." However, *this language obviously relates back to a plan or purpose to rob or to extort.*

Department of Justice, *Handbook for Prosecution of Racketeers*, III(b)-(3) (Apr. 30, 1965) (emphasis added); accord 10 Department of Justice, *United States Attorneys' Manual* § 9-131.220, Ch. 131, 37 (May 8, 1984) (The Hobbs Act "does not

make criminal the act of obstructing commerce by actual or threatened violence in the absence of a purpose or plan to rob or extort."). And it remains the position of the United States that "[t]he statutory prohibition of 'physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section' is confined to violence for the purpose of committing robbery or extortion." Department of Justice, *Criminal Resource Manual* § 2402 (1997).

The United States is aware of only two reported attempts by federal prosecutors to advance the view that the Hobbs Act contains a free-standing prohibition against violence that affects interstate commerce. In both instances, the court of appeals summarily rejected the prosecutor's novel reading of the Act. *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999); *United States* v. *Franks*, *supra*. Indeed, in the Hobbs Act's 59-year history, the Hobbs Act apparently has never resulted in criminal punishment for physical violence that did not further an intended robbery or extortion. It is exceedingly "unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." *United States* v. *Enmons*, 410 U.S. at 410.

II. RICO DOES NOT AUTHORIZE A PRIVATE CAUSE OF ACTION FOR INJUNCTIVE RELIEF

A. RICO's Text And Structure Vest Exclusive Authority In The Attorney General To Sue For Equitable Relief

RICO's civil remedies provision, 18 U.S.C. 1964, authorizes two causes of action: a public enforcement action for equitable relief by the Attorney General and a treble damages action by private parties. The Attorney General's right to sue for equitable relief derives from Section 1964(a) and (b), and those provisions, in combination, make the Attorney General's right exclusive.

1. Section 1964(a) grants district courts "jurisdiction to prevent and restrain violations" of RICO by issuing the full range of "appropriate orders" available to courts of equity. 18 U.S.C. 1964(a). Section 1964(a) does not identify who can seek such relief, but Section 1964(b) does. That provision states that "[t]he Attorney General may institute proceedings under this section" and that, "[p]ending final determination thereof," the court may enter interim restraining orders or take such other actions as it shall deem proper. 18 U.S.C. 1964(b).

By empowering the Attorney General to institute proceedings "under this section," Congress signaled its intent that the district court's equitable jurisdiction under Section 1964(a) must be invoked by the Attorney General. Congress further manifested its intent that the Attorney General alone may seek equitable relief by providing in subsection (b) that temporary equitable relief may be awarded "[p]ending final determination" of a proceeding instituted by the Attorney General for permanent equitable relief. There is no corresponding provision that authorizes a private party to institute proceedings "under this section" or to seek temporary equitable relief pending final disposition of a claim. Under Section 1964(a) and (b), therefore, the sole power to seek final and interim equitable relief against racketeering activities and enterprises is reposed in the Attorney General.

Rather than authorize private civil RICO plaintiffs to seek equitable remedies, Congress in Section 1964(c) granted private parties the right to bring suit to recover treble damages and attorney's fees. Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a [RICO] violation * * * may sue * * * and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. 1964(c). That provision has been construed to authorize private parties, and not the government, to seek treble damages. *United States* v. *Bonanno*, 879 F.2d 20, 22-24 (2d Cir. 1989) (reasoning that the United States is not a "person" under Section 1964(c)); see also *Sedima, S.P.R.I.* v. *Imrex Co.*, 473 U.S. 479, 487 (1985) (observing that Section 1964(c) creates "a private treble-damages action").

Section 1964's "inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in [Section 1964(c)], logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs." *Religious Tech. Ctr.* v. *Wollersheim*, 796 F.2d 1076, 1083 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). Coupled with the fact that Congress in Section 1964(b) explicitly authorized the Attorney General to initiate proceedings to obtain equitable relief under Section 1964(a), but did not similarly grant private parties that right, the statute makes it clear that Congress did not authorize private parties to bring actions for equitable relief.

2. In concluding otherwise, the Seventh Circuit reasoned:

> Given that the government's authority to seek injunctions comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a), we see no reason not to conclude, by parity of reasoning, that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c).

04-1244 Pet. App. 38a. That analysis is flawed, because Section 1964(c)'s grant of a private treble damages action is not parallel to Section 1964(b)'s grant of authority to the Attorney General to file an equitable action. As explained above, Section 1964(b) expressly grants the Attorney General the right to bring proceedings under "this section," an obvious cross-reference to the court's power to award equitable relief set

forth in the immediately preceding subsection (a). Section 1964(c), by contrast, is an independent, self-contained grant of a private right to recover treble damages. The provision contains no express or implied reference to, or incorporation of, Section 1964(a).

The court of appeals' interpretation is also undermined by its recognition (04-1244 Pet. App. 43a) that Section 1964(b) grants only the government the right to seek *preliminary* equitable relief. Under the court of appeals' reading of the statute, private parties may seek permanent injunctive relief but not preliminary relief pending final resolution of their claims. There is no reason, however, why Congress would have intended that highly anomalous result. Rather, the logical interpretation of the statute is that Congress created a symmetrical statutory scheme under which the Attorney General may seek temporary and final equitable relief, and private parties may seek treble damages.

B. A Comparison With The Antitrust Laws Shows That Congress Did Not Create A Private Injunctive Action

The statutory language that forms the closest antecedent for the private remedial provision in RICO is found in the antitrust laws. At a time when Congress had provided no express authority for private antitrust plaintiffs to seek equitable relief, the antitrust laws were construed to preclude such relief. The parallels between the antitrust laws at that time and the language of RICO support the same conclusion here —particularly since RICO lacks the explicit provision for private injunctive relief that Congress added to the antitrust laws. RICO's legislative history reveals that the statute's omission of authority for private RICO plaintiffs to seek equitable relief was deliberate.

1. As this Court has explained, "[a] treble-damages remedy for persons injured by antitrust violations was first provided in § 7 of the Sherman Act and was re-enacted in 1914 without substantial change as § 4 of the Clayton Act." *Pfizer, Inc.* v. *India*, 434 U.S. 308, 311 (1978); accord *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 267 n.13 (1992); *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 644 n.16 (1981).[2] Section 4 of the Sherman Act also authorized courts to issue equitable relief in actions brought by the United States. 26 Stat. 209-210.[3] This Court repeatedly recognized that those provisions of the Sherman Act did not authorize private parties to bring suit for injunctive relief.[4] Private parties were not authorized to seek injunctive relief for violations of the antitrust laws until Congress passed Section 16 of the Clayton Act (15 U.S.C. 26) *explicitly* authorizing such a right. *California* v. *American Stores Co.*, 495 U.S. 271, 287 (1990) ("§ 4 of the Sherman Act, which authorizes equita-

---

[2] Section 7 of the Sherman Act provided that "[a]ny person who shall be injured in his business or property * * * by reason of anything forbidden or declared to be unlawful by this act[] may sue therefor * * * and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 26 Stat. 210.

[3] Section 4 of the Sherman Act provided:

> The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [P]ending [a] petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

26 Stat. 209-210.

[4] *General Inv. Co.* v. *Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 286 (1922); *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 593 (1921); *Paine Lumber Co.* v. *Neal*, 244 U.S. 459, 471 (1917); *D.R. Wilder Mfg. Co.* v. *Corn Prods. Ref. Co.*, 236 U.S. 165, 174 (1915); *Minnesota* v. *Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904).

ble relief in actions brought by the United States, was reenacted as § 15 of the Clayton Act, while § 16 filled a gap in the Sherman Act by authorizing equitable relief in private actions."); accord *General Inv. Co.* v. *Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 287 (1922).

The Sherman Act thus "envisaged two classes of actions,—those made available only to the Government, * * * and, in addition, a right of action for treble damages granted to redress private injury." *United States* v. *Cooper Corp.*, 312 U.S. 600, 608 (1941) (holding that the United States may not recover treble damages under the Sherman Act). The Court reached that conclusion despite the fact "that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject." *D.R. Wilder Mfg. Co.* v. *Corn Prods. Ref. Co.*, 236 U.S. 165, 174 (1915). The Court explained that "such exclusion must be implied * * * because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.'" *Id.* at 174-175 (quoting *Farmers' & Mechs. Nat'l Bank* v. *Dearing*, 91 U.S. 29, 35 (1875)).[5]

---

[5] For those reasons, respondents erred below in relying on courts' "inherent powers to issue injunctions" "absent the clearest congressional command to the contrary." Resp. C.A. Br. 39 (citing *Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979)). That presumption is inapplicable here, where Congress passed RICO against the backdrop of this Court's Sherman Act decisions that held that courts had no authority to award injunctive relief to private parties despite any "words of express exclusion" of that authority. *D.R. Wilder Mfg. Co.*, 236 U.S. at 174. In any event, the issue in this case is not whether courts have "*inherent* powers to issue injunctions." Section 1964(a) confers on district courts the *express* power to grant equitable relief, and that grant of authority encompasses the full range of equitable powers available to a court. See *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946); *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960); but see *United States* v. *Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005) (denying availability of disgorgement under RICO), petition for cert. pending, No. 05-92 (filed July 18, 2005). RICO does not, however, confer standing on private parties to invoke such a power. Rather, Section 1964 gives only the Attorney General the authority to institute proceedings seeking equitable relief.

Although the Sherman Act authorizes suits in equity in one paragraph (Section 4), while RICO does so in two paragraphs (Section 1964(a) and (b)), the statutes are parallel in the critical respects here. First, both confer on courts "jurisdiction" to prevent and restrain violations through permanent and preliminary equitable relief, but expressly authorize only the Attorney General to seek such relief. Second, both provide private parties a separate right to recover treble damages and attorney's fees, but no other forms of relief. In light of this Court's precedents construing the Sherman Act, Congress is presumed to be aware when it enacted RICO that, absent inclusion of an *express* private right to obtain injunctive relief, the language it selected would be construed to exclude such a right. *Holmes*, 503 U.S. at 268 (construing the term "by reason of" in Section 1964(c) and observing that the Court "may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4").

Indeed, to authorize private antitrust plaintiffs to seek equitable relief, Congress enacted a separate section of the Clayton Act, Section 16. RICO, however, lacks any provision comparable to Section 16 of the Clayton Act. The court of appeals thus erred in suggesting that RICO in Section 1964 contains the same remedies as the Clayton Act, including Section 16. 04-1244 Pet. App. 42a-43a. Section 16 expressly provides that private persons "shall be entitled to sue for and have injunctive relief." 15 U.S.C. 26. Juxtaposed with Con-

gress's explicit modeling of RICO's private treble damages provision "on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act," *Holmes*, 503 U.S. 267, the absence of a counterpart to Section 16 makes clear that Congress did not intend to create a private right to equitable relief under RICO.

2. The legislative history of RICO confirms that Congress made a deliberate choice in omitting authority for a private injunctive action. "The civil remedies in the bill passed by the Senate, S.30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d)." *Sedima*, 473 U.S. at 486-487; *Agency Holding Corp.* v. *Malley-Duff & Assoc.*, 483 U.S. 143, 152 (1987) (same). "During hearings on S. 30 before the House Judiciary Committee, Representative Steiger proposed the addition of a private-treble damages action" that was modeled after Section 4 of the Clayton Act. *Sedima*, 473 U.S. at 487. That amendment also would have authorized private parties to seek injunctive relief and the government to seek damages, as well as making other procedural changes. 116 Cong. Rec. 27,739 (1970). When the Judiciary Committee responded by passing only the private treble damages provision, Representative Steiger complained that the bill did "not do the whole job," since it "fail[ed] to provide * * * two important substantive remedies included in the Clayton Act: compensatory damages to the United States when it is injured in its business or property, and *equitable relief in suits brought by private citizens.*" *Id.* at 35,227, 35,228 (emphasis added).

Representative Steiger subsequently offered another amendment, again to authorize a private injunctive action and a public damages action. *Sedima*, 473 U.S. at 487; 116 Cong. Rec. 35,228; *id.* at 35,346. Concerned about "the potential consequences that this new remedy might have," Representative Poff asked Representative Steiger to withdraw the

amendment for further study by the Judiciary Committee, and Representative Steiger agreed. *Agency Holding Corp.*, 483 U.S. at 154-155 (citing 116 Cong. Rec. at 35,346).

Shortly after RICO was enacted, Senators Hruska and McClellan, RICO's sponsors, introduced S. 16, a bill that again would have authorized damage actions by the United States and injunctive actions by private persons. *Agency Holding Corp.*, 483 U.S. at 155 ("[T]he purpose of [S. 16] was to broaden even further the remedies available under RICO. In particular, * * * it would have further permitted private actions for injunctive relief."). The Senate, but not the House, passed S. 16, and therefore it never became law. *Wollersheim*, 796 F.2d at 1086.

Congress thus passed RICO without authorizing private injunctive actions despite repeated attempts to do so, and despite Congress's explicit grant of such a right in Section 16 of the Clayton Act. Congress shortly thereafter rejected an amendment to RICO that would have added such a right. The clear conclusion to be drawn from the legislative history is that, consistent with RICO's text, Congress intended to create a private right of action only for treble damages.[6]

C. Policy Considerations Do Not Support A Private Right To Injunctive Relief Under RICO

The purposes underlying RICO are fully consistent with limiting equitable actions to suits brought by the Attorney General. RICO was designed "to provide new weapons of unprecedented scope for an assault on organized crime and its

---

[6] The court of appeals erred in relying (see 04-1244 Pet. App. 39a-40a) on Congress's directive that RICO should be "liberally" construed. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, Tit. IX, § 904(a), 84 Stat. 947. That provision cannot be invoked to overcome the text, structure, and legislative history of Section 1964, which affirmatively foreclose a private action for injunctive relief.

economic roots." *Russello* v. *United States*, 464 U.S. 16, 26 (1983). To eradicate that sustained criminal conduct, Congress expressly authorized district courts to enter wide-ranging equitable relief, including divestiture and corporate reorganization and dissolution. *United States* v. *Turkette*, 452 U.S. 576, 585 (1981). Corporate dissolution, however, is "a judgment of corporate death, which represent[s] the extreme rigor of the law." *California* v. *American Stores Co.*, 495 U.S. at 289 (internal quotation marks and ellipses omitted). It is therefore not surprising that Congress entrusted the Attorney General, acting with "official unity of initiative," with the exclusive authority to obtain such relief. *D.R. Wilder Mfg. Co.*, 236 U.S. at 174. As this Court explained in discussing the Sherman Act, Congress wanted to "confine the right to question the legal existence of a corporation * * * to public authority sanctioned by the sense of public responsibility and not to leave it to individual action prompted it may be by purely selfish motives." *Id.* at 176.

It is neither necessary nor appropriate to construe RICO implicitly to place those same remedies in private hands. Congress explicitly authorized a private right of action for damages under RICO and provided for a treble damages remedy as a deterrent against future harm. In particular contexts when Congress has wished to go further and authorize private injunctive relief for a new statutory right, it has so provided. For instance, although the conduct at issue here pre-dates the Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 3, 108 Stat. 694, that Act expressly provides for suits by private persons to obtain temporary and permanent injunctive relief against threats or acts of force that interfere with the obtaining or providing of abortion services. 18 U.S.C. 248(a) and (c)(1)(B).

CONCLUSION

The judgment of the court of appeals remanding the case to the trial court should be reversed.

Respectfully submitted.

EDWIN S. KNEEDLER*
Acting Solicitor General
JOHN C. RICHTER
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LISA S. BLATT
Assistant to the Solicitor General
KATHLEEN A. FELTON
FRANK MARINE
Attorneys

SEPTEMBER 2005

---

* The Solicitor General is recused in this case.

APPENDIX A

June 27, 1946

Honorable Paul H. Appleby
Acting Director
Bureau of the Budget
Washington, D.C.

My dear Mr. Appleby:

In compliance with your request of June 24, 1946, I have examined the facsimile of the bill (H.R. 32) which is before you in enrolled form. "To amend the Act entitled 'An Act to protect trade and commerce against interference by violence, threats, coercion, or intimidation', approved June 18, 1934."

Under existing law (18 U.S.C. 420a-420e), it is a criminal offense for any person, in connection with or in relation to any act which, in any way or degree, affects trade or commerce or any article or commodity moving or about to move in trade or commerce (1) to obtain or attempt to obtain the payment of money or other valuable consideration or the purchase or rental of property or protective services by the use of or the threat to use force, violence or coercion; or (2) to obtain the property of another with his consent, induced by wrongful use of force or fear or under color of official right; or (3) to commit or threaten to commit an act of physical violence to a person or property in furtherance of a plan or purpose to violate any of the foregoing prohibitions. It is expressly provided that the terms "property," "money," or "valuable consideration" shall not be deemed to include wages paid by a bona fide employer to a bona fide employee.

The penalty provided by existing law is imprisonment for a period of from one to ten years or a fine of $10,000, or both. Prosecutions under existing law may be had only upon the express direction of the Attorney General and in any district in which any part of the offense has been committed.

In the case of *United States* v. *Local 807*, 315 U.S. 521, the foregoing Act was considered by the Supreme Court. The Court stated the following to be the facts involved in that case: That the defendant included in its membership nearly all of the motor truck drivers and helpers in the City of New York; that large quantities of merchandise which went into the City from neighboring States had been transported in trucks manned by drivers and helpers who resided in the localities from which the shipments were made and who were not members of Local 807; that it had formerly been the practice of these out-of-state drivers to make deliveries to the warehouses of consignees in New York City and to pick up other merchandise from New York shippers for delivery on the return trip to consignees in surrounding States; that the defendant conspired to use, and did use, violence and threats to obtain from the owners of these trucks certain sums of money for each truck entering the City; that the amounts so obtained were the regular union rates for a day's work of driving and unloading; that in some cases the out-of-state driver was compelled to drive the truck to a point close to the city limits, and then to turn it over to one of more of the defendant's members, who would then drive the truck to its destination, do the unloading, pick up the merchandise for the return trip and surrender the truck to the out-of-state driver at the point where they had taken it over; that in other cases money was demanded and obtained from the owners, or drivers who rejected offers of the defendant's members to do, or help with, the driving or unloading; and that in other cases the defendant's members

after receiving the money either failed to offer to work or refused to work when asked to do so by the owners or out-of-state drivers.

The Court held that as the result of the provision excluding "the payment of wages by a bona fide employer to a bona fide employee" contained therein, existing law did not apply to the foregoing situation, since it merely involved the use or threat of violence by the defendant for the purpose of obtaining the opportunity to work for money or for the purpose of obtaining money even though the employers refused to permit the defendant to work. The Court in so holding cited as an analogy in support of its position the use of stand-by musicians, which it said was a well known labor practice. The Court, in holding that the activities involved in the case were among those practices of labor unions which did not fall within the ban of the Anti-Racketeering Act, stated that "This does not mean that such activities are beyond the reach of Federal legislative control."

According to the report of the House Committee on the Judiciary concerning this legislation (H. Rept. 238, 79th Cong.), the bill under consideration was introduced to counteract the effect of the foregoing decision. The bill repeals existing law and provides a substitute therefor. It makes it a criminal offense punishable by imprisonment for not more than 20 years or a fine of not more than $10,000, or both, to obstruct, delay or affect commerce, or the movement of any article or commodity in commerce by robbery or extortion. (Secs. 2, 6.)

The term "robbery" is defined as the unlawful taking or obtaining of personal property from another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or to property in his custody or possession, or to the person or property of a relative or a member of his family or to anyone

in his company. (Sec. 1(b).) The term "extortion" is defined as the obtaining of property from another with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (Sec. 1(c).)

The exception provided in existing law for the payment of wages by a bona fide employer to a bona fide employee is repealed as is the prohibition against the commencing of prosecutions without the express direction of the Attorney General. Conspiracies, attempts and acts in furtherance of a plan or purpose to do anything prohibited by the legislation are also made unlawful. (Secs. 3-5.)

Title II of the bill expressly states that nothing in the Act shall be construed to repeal, modify or affect sections 6 and 20 of the Clayton Act (15 U.S.C. 17 and 29 U.S.C. 52), the Norris-LaGuardia Act (29 U.S.C. 101-115), the Railway Labor Act (45 U.S.C. 151-188), or the National Labor Relations Act (29 U.S.C. 151-166).

An almost identical bill (H.R. 653) was introduced in the Seventh-eighth Congress. Title I of that bill was identical with Title I of the bill under consideration. Title II of the earlier bill related to the willful obstruction by force, or threats of force, of the transportation of troops, munitions or war supplies during World War II. The provisions contained in Title II of the bill under consideration were contained in a proviso to Title II of the earlier bill.

After the bill in the Seventy-eighth Congress was reported by the House Judiciary Committee, Chairman Sumners of that Committee filed a supplemental report (H. Rept. 66, Part 2, 78th Cong.) in which he proposed an amendment making the proviso in Title II a separate title, so that it would clearly by applicable to the entire measure. In that supplemental report, Chairman Sunmers stated as follows:

> "It is considered by the committee that the provisions of title I were not intended to prevent the doing of acts authorized under the above-mentioned statutes but in order to remove any question the committee has agreed to the hereafter-mentioned amendment, which is additional to the committee amendment contained in the original report and recommended therein. The proposed additional amendment is not intended to be interpreted as authorizing any unlawful acts, particularly those amounting to robbery or extortion. The need for the legislation was emphasized by the opinion of the Supreme Court in the case of *United States* v. *Local 807* (315 U.S. 521)."

That amendment, which is identical with Title II of the bill under consideration was adopted and the bill was passed by the House of Representatives on April 9, 1943.

When the bill under consideration was introduced in the Seventy-ninth Congress it contained three titles and was identical with the earlier bill (H.R. 653) as it was passed by the House of Representatives in the Seventy-eighth Congress. Title II of the bill as introduced was stricken from the legislation when the bill was passed by the House of Representatives on December 12, 1945, because the need for it had ceased to exist, since it was intended to be limited to the period of World War II. Title III of the bill became Title II. (91 Cong. Rec. 12102.)

While the bill under consideration was being debated in the House of Representatives considerable discussion was devoted to the effect of Title II. Congressman Hobbs, the author of the bill, made the following observations (91 Cong. Rec. 12085):

> "Title III of the bill (now Title II) exempts from the operation of this law any conduct under the antitrust

statutes, under the NLRB Act, under the Norris-LaGuardia statute, the Railway Labor Act, the Big Four that have been termed the Magna Carta of labor. * * *

"Let me point out that when you are striking, when you are picketing, when you are organizing a labor union, or engaging in any legitimate labor function, then you are operating under some one of those four laws that are specifically exempted in this bill by title III (now Title II). Aside from that there is absolutely nothing farther from the mind of any proponent of this bill than to hurt labor. Did we amend this bill when the Teamsters' Union struck in Washington? Not at all, no matter how much it hurt. It was not highway robbery. They were exercising their legitimate right to strike. The same thing is true of all the other legitimate activities of Labor, and I resent just as bitterly as you or anybody else does the aspersion cast upon organized labor that robbery and extortion are legitimate activities of organized labor."

Congressman Hobbs further remarked that representatives of organized labor appeared before the House Committee on the Judiciary, of which he is a member, and stated that organized labor would have no objection to the enactment of a bill outlawing robbery or extortion in interstate commerce provided the bill preserved the rights of labor "under the four branches of labor's Magna Carta." (91 Cong. Rec. 12096.)

In view, therefore, of the express language of Title II of the bill and the above-mentioned legislative history, it seems clear that the measure will not interfere with labor's right to strike and picket peacefully or to take any other legitimate and peaceful concerted action. Moreover, since the Federal Government is charged by the Constitution with the duty of

regulating commerce among the states, it does not appear inappropriate for the Congress to enact legislation making it a Federal offense to interfere with or impede the free flow of interstate commerce by robbery or extortion.

In view of the foregoing, I find no objection to the approval of the bill.

Sincerely yours,

Attorney General

APPENDIX B

1. Section 1951, of Title 18, U.S.C., provides in relevant part:

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and

all other commerce over which the United States has jurisdiction.

* * * * *

2. Section 1964, of Title 18, U.S.C., provides in relevant part:

§ 1964 Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of Section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that

no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962.

* * * * *

Supreme Court, U.S.
FILED
SEP 2 - 2005
OFFICE OF THE CLERK

Nos. 04-1244, 04-1352

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR PETITIONERS JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.

THOMAS BREJCHA
DEBORAH FISCHER
CHRISTOPHER HENNING
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
1880 S. Redwood Street
Escondido, CA 92025
(760) 737-7181

ALAN UNTEREINER*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
NOAH MESSING
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

QUESTIONS PRESENTED

In *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court reversed a decision of the Seventh Circuit that had affirmed a civil judgment and nationwide injunction entered under the Racketeer Influenced and Corrupt Organizations Act (RICO) against various anti-abortion protesters. In reversing, this Court explained (*id.* at 411 (emphasis added in part)): "Because *all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*, *the judgment* that petitioners violated RICO *must also be reversed*. Without an underlying RICO violation, the *injunction* issued by the District Court *must necessarily be vacated*." On that basis, this Court determined that it "need not address the second question" on which certiorari had been granted, namely "whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." *Ibid.*

The questions presented are:

1. Whether the Seventh Circuit, on remand, disregarded this Court's mandate by holding that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the "injunction issued by the District Court" might *not* need to be vacated.

2. Whether the Hobbs Act, 18 U.S.C. § 1951(a), punishes acts or threats of physical violence against "any person or property" in a manner that "in any way or degree * * * affects commerce," even if such acts or threats of violence are wholly unconnected to either extortion or robbery.

3. Whether injunctive relief is available in a private civil action for treble damages brought under RICO, 18 U.S.C. § 1964(c).

RULE 24.1(b) AND 29.6 STATEMENT

Respondent National Organization for Women, Inc. (NOW) is a party to this action on behalf of itself and its women members as well as on behalf of a class of all other women "whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by [petitioners'] unlawful activities." 04-1244 Pet. App. 170a n.12. Other respondents here (plaintiffs below) are the Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., which appear on their own behalf as well as on behalf of a class of "all women's health centers in the United States at which abortions are performed." *Ibid.*

Petitioner Pro-Life Action League, Inc., has no parent corporation and does not issue stock to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 24.1(b) and 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. Factual and Procedural Background 2

B. This Court's Decision in *Scheidler II* 6

C. The Seventh Circuit's Decision on Remand 7

INTRODUCTION AND SUMMARY OF ARGUMENT 11

ARGUMENT 13

I. THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S CLEAR MANDATE 13

A. "All" Of The RICO Predicates "Must Be Reversed" 14

B. The "Judgment" Of Liability Under RICO "Must Also Be Reversed" 18

TABLE OF CONTENTS—Continued

Page

C. The Injunction "Must Necessarily Be Vacated" .. 19

II. THE HOBBS ACT DOES NOT MAKE ACTS OR THREATS OF VIOLENCE UNCONNECTED TO ROBBERY OR EXTORTION A FEDERAL CRIME 20

A. The Seventh Circuit's Interpretation Is Inconsistent With The Text, Structure, And Legislative History Of The Hobbs Act 20

B. The Seventh Circuit's Interpretation Should Be Rejected For Other Reasons As Well 27

C. The Seventh Circuit's Other Grounds For Concluding That The Hobbs Act Could Be Read As A General Anti-Violence Provision Were All Mistaken 32

III. RICO DOES NOT AUTHORIZE PRIVATE PLAINTIFFS TO SEEK INJUNCTIVE RELIEF ... 37

A. The Language And Structure Of 18 U.S.C. § 1964 Demonstrate That Private Plaintiffs Are Not Entitled To Injunctive Relief 37

B. Other Evidence In The Legislative History Confirms Congress's Intent Not To Allow Private Parties To Seek Injunctive Relief 45

C. Allowing Private Parties To Seek Injunctive Relief Under Section 1964(a) Would Vastly Expand The Scope Of Civil RICO 48

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases:

Agency Holding Corp. v. *Malley-Duff & Assocs.*, 483 U.S. 143 (1987) ..... *passim*

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 45

Alexander v. *United States*, 509 U.S. 544 (1993) 32

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 26

Amoco Prod. Co. v. *Village of Gambell*, 480 U.S. 531 (1987) 18

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 31

Associated Gen. Contractors of California, Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983) 39

Bell v. *United States*, 349 U.S. 81 (1955) 27

Bray v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) 18

California v. *American Stores Co.*, 495 U.S. 271 (1990) 39, 49, 50

Callanan v. *United States*, 364 U.S. 587 (1961) 27, 36

Caterpillar Inc. v. *Lewis*, 519 US. 61 (1996) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Chick Kam Choo v. *Exxon Corp.*, 486 U.S. 140 (1988) 19

Chickasaw Nation v. *United States*, 534 U.S. 84 (2001) 48

City of Sherrill v. *Oneida Indian Nation*, 125 S. Ct. 1478 (2005) 15

Cleveland v. *United States*, 531 U.S. 12 (2000) 27, 28, 31

D.R. Wilder Mfg. Co. v. *Corn Prods. Refining Co.*, 236 U.S. 165 (1915) 39

Geddes v. *Anaconda Copper Mining Co.*, 254 U.S. 590 (1921) 39

Graves v. *Cambria Steel Co.*, 298 F. 761 (N.Y. 1924) 50

Great-West Life & Annuity Ins. v. *Knudson*, 534 U.S. 204 (2002) 45

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 31

Griffin v. *United States*, 502 U.S. 46 (1991) 19

H.J. Inc. v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) 45

Holmes v. *SIPC*, 503 U.S. 258 (1992) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

In re Fredeman Litigation, 843 F.2d 821 (5th Cir. 1988) 44, 45

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 48

Kaushal v. *State Bank of India*, 556 F. Supp. 576 (N.D. Ill. 1983) 44

Klehr v. *A.O. Smith Corp.*, 521 U.S. 179 (1997) 40

Lorillard Tobacco Co. v. *Reilly*, 533 U.S. 525 (2001) 26

Maryland v. *Baldwin*, 112 U.S. 490 (1884) 18, 19

Minnesota v. *Northern Securities Co.*, 194 U.S. 48 (1904) 38, 39, 50

Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 19, 20

Morissette v. *United States*, 342 U.S. 246 (1952) 24

Muniz v. *Hoffman*, 422 U.S. 454 (1975) 24

NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 31, 32

National Organization for Women, Inc. v. *Scheidler*, 510 U.S. 249 (1994) 1, 4

TABLE OF AUTHORITIES—Continued

Page(s)

National R.R. Passenger Corp. v. *National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) 45

Ohio v. *Robinette*, 519 U.S. 33 (1996) 15

Paine Lumber Co. v. *Neal*, 244 U.S. 459 (1917) .. 38, 39, 42

Parks v. *Simpson Timber Co.*, 389 U.S. 909 (1967) 15

People v. *Di Stefano*, 38 N.Y.2d 640 (1976) 34

People v. *Mahboubian*, 74 N.Y.2d 174 (1989) 34

People v. *Rizzo*, 158 N.E. 888 (N.Y. 1927) 34

Ratzlaf v. *United States*, 510 U.S. 135 (1994) 28

Religious Tech. Ctr. v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987) 6, 48

Reno v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993) 15

Reves v. *Ernst & Young*, 507 U.S. 170 (1993) 44, 45

Rewis v. *United States*, 401 U.S. 808 (1971) 27

Rotella v. *Wood*, 528 U.S. 549 (2000) 40, 45

Russello v. *United States*, 464 U.S. 16 (1983) 48

TABLE OF AUTHORITIES—Continued

Page(s)

Scheidler v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) ..... *passim*

Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 44, 46

Sedima, S.P.R.L. v. *Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), rev'd on other grounds, 473 U.S. 479 (1985) 46

Stirone v. *United States*, 361 U.S. 212 (1960) 9, 32, 33

Sunkist Growers, Inc. v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962) 18

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 45

Union Trust Co. v. *Eastern Air Lines, Inc.*, 350 U.S. 962 (1956) 15

United States v. *Bass*, 404 U.S. 336 (1971) 31

United States v. *Carson*, 52 F.3d 1173 (2d Cir. 1995), cert. denied, 516 U.S. 1122 (1996) 49

United States v. *Cook*, 384 U.S. 257 (1966) 24

United States v. *Cooper Corp.*, 312 U.S. 600 (1941) 39

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Culbert*, 435 U.S. 371 (1978) 25, 30

United States v. *DiGregorio*, 605 F.2d 1184 (1st Cir.), cert. denied, 444 U.S. 937 (1979) 35, 36

United States v. *Enmons*, 410 U.S. 396 (1973) ..... *passim*

United States v. *Franks*, 511 F.2d 25 (6th Cir.), cert. denied, 422 U.S. 1042 (1975) 8, 20, 23

United States v. *Kemble*, 198 F.2d 889 (3d Cir.), cert. denied, 344 U.S. 893 (1952) 25

United States v. *Local 807*, 315 U.S. 521 (1942) 25

United States v. *Milton*, 1998 WL 468812 (4th Cir. Aug. 4, 1998) 9, 33

United States v. *Philip Morris*, 396 F.3d 1190 (D.C. Cir. 2005), petition for cert. pending, No. 05-92 45

United States v. *Ryder*, 110 U.S. 729 (1884) 23

United States v. *Stephenson*, 895 F.2d 867 (2d Cir. 1990) 31

United States v. *Wilson*, 997 F.2d 208 (6th Cir. 1993) 36

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Yankowski*, 184 F.3d 1071 (1999) ..... *passim*

Vendo Co. v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977) 39

Yates v. *United States*, 354 U.S. 298 (1957) 18

Statutes and Rules:

15 U.S.C. § 1 3

18 U.S.C. § 248 30

18 U.S.C. § 1951 ..... *passim*

18 U.S.C. § 1951(a) ..... *passim*

18 U.S.C. § 1951(b) 22

18 U.S.C. § 1951(b)(1) 35

18 U.S.C. § 1951(b)(2) 7, 28, 31

18 U.S.C. § 1952(b) 5

18 U.S.C. § 1961 ..... 3, 37

18 U.S.C. § 1961(1) 30

18 U.S.C. § 1961(1)(A) 5, 30

TABLE OF AUTHORITIES—Continued

Page(s)

18 U.S.C. § 1962(a) 3, 4

18 U.S.C. § 1962(c) 3, 4, 5

18 U.S.C. § 1962(d) 3, 4

18 U.S.C. § 1963 ..... 3, 37

18 U.S.C. § 1963(a) 32

18 U.S.C. § 1964 ..... *passim*

18 U.S.C. § 1964(a) ..... *passim*

18 U.S.C. § 1964(b) ..... *passim*

18 U.S.C. § 1964(c) ..... *passim*

18 U.S.C. § 1965 ..... 3, 37

18 U.S.C. § 1966 ..... 3, 37

18 U.S.C. § 1967 ..... 3, 37

18 U.S.C. § 1968 ..... 3, 37

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1651 1

Act of June 18, 1934, ch. 569, 48 Stat. 979 ..... 21, 26

Act of July 3, 1946, ch. 537, 60 Stat. 420 21

TABLE OF AUTHORITIES—Continued

Page(s)

Clayton Act, ch. 323, § 4, 38 Stat. 730 (1914) 38

Clayton Act, ch. 323, § 15, 38 Stat. 730 (1914) .. 41, 42, 44

Clayton Act, ch. 323, § 16, 38 Stat. 730 (1914) 39, 41

Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 ..... 41, 44

Law of July 2, 1890, ch. 647, § 7, 26 Stat. 209 38

Organized Crime Control Act of 1970,
Pub. L. No. 91-452, 84 Stat. 941 37

Pub. L. No. 486, 60 Stat. 420 (1946) 21

N.Y. PENAL LAW § 530 (1909) 26

FED. R. CIV. P. 23(b)(2) 4

FED. R. CIV. P. 23(b)(3) 4

S. CT. RULE 14.1(a) 11, 15, 16

Miscellaneous:

18 U.S.C. App. (Reviser's Notes) (1948) 24, 25

78 CONG. REC. 5734 (1934) 27

78 CONG. REC. 451 (1934) 37

TABLE OF AUTHORITIES—Continued

Page(s)

89 CONG. REC. 3214 (1943) 37

89 CONG. REC. 3227 (1943) 26

91 CONG. REC. 11,903 (1945) 36

91 CONG. REC. 11,905 (1945) 36

91 CONG. REC. 11,908 (1945) 26, 36, 37

115 CONG. REC. 6995-96 (1969) 46

116 CONG. REC. 35,227-28 (1970) 47

116 CONG. REC. 35,346 (1970) 46, 47, 48

116 CONG. REC. 35,347 (1970) 47

118 CONG. REC. 29,368 (1972) 48

118 CONG. REC. 29,369-70 (1972) 48

118 CONG. REC. 29,379 (1972) 48

Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439 (1948-1949) 24

Batey, *Minority Report and the Law of Attempt*, 1 OHIO ST. J. CRIM. L. 689 (Spring 2004) 34

TABLE OF AUTHORITIES—Continued

Page(s)

Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies*, 53 TEMPLE L.Q. 1009 (1980) 46

Bradley, *NOW v. Scheidler: RICO Meets The First Amendment*, 1994 SUP. CT. REV. 129 (1994) 34, 35

H.R. 19215, 91st Cong., 2d Sess. (1970) 46

H.R. 19586, 91st Cong., 2d Sess. (1970) 46

MODEL PENAL CODE (1962) 34

Note, *Protesters, Extortion and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999) 32

Organized Crime Control: House Hearings on S. 30 Before the House Comm. on the Judiciary, 91st Cong., 2d Sess. 520 (1970) 42, 43, 46

S. 1623, 91st Cong., 1st Sess. (1969) 46

S. 1861, 91st Cong., 1st Sess. (1969) 32

S. 2049, 90th Cong., 1st Sess. (1967) 46

S. 2248, 73d Cong., 2d Sess. (1934) 27

THE GODFATHER (Paramount Pictures 1972) 35, 36

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL (1997) 23

U.S. DEP'T OF JUSTICE, RACKETEERING INFLUENCED & CORRUPT ORGANIZATIONS: A MANUAL FOR FEDERAL PROSECUTORS (2000) 37, 49

OPINIONS BELOW

The opinion of the court of appeals denying rehearing (04-1244 Pet. App. 1a-24a) is reported at 396 F.3d 807. The previous order of the court of appeals on remand (04-1244 Pet. App. 25a-29a) from this Court is unreported. The earlier opinion of the court of appeals (*id.* at 30a-61a), which this Court reversed, is reported at 267 F.3d 687. The district court's opinion disposing of the motion to dismiss the third amended complaint (04-1244 Pet. App. 62a-140a) is reported at 897 F. Supp. 1047. The district court's opinion denying post-trial motions and entering an injunction (04-1244 Pet. App. 141a-174a) is unreported.

JURISDICTION

The court of appeals entered its order on remand on February 26, 2004, and denied rehearing on January 28, 2005. 04-1244 Pet. App. 1a, 25a. The petitions for certiorari were timely filed on March 16 and April 11, 2005, and granted in an order consolidating the two cases on June 28, 2005. This Court's jurisdiction rests on 28 U.S.C. § 1254(1). The Court also has jurisdiction over the first question presented under 28 U.S.C. § 1651. See 04-1244 Pet. 13-14 n.6.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Hobbs Act, 18 U.S.C. § 1951, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, and various federal and state statutes that were precursors of (or models for) the Hobbs Act or RICO, are set forth in an appendix to this brief (App., *infra*, 1a-8a).

STATEMENT

For 19 years, respondents have pursued this racketeering lawsuit against several individuals and organizations (petitioners here) that have engaged in or supported sit-ins and other political protests against abortion clinics. This Court has issued two opinions in the case. *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) (*Scheidler II*); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*Scheidler I*). In *Scheidler II*, the Court to all appearances

brought this case to an end by holding that the political protesters' mere interference with others' property or liberty interests, without any showing of wrongful "obtaining" of another's "property," does not constitute extortion in violation of the Hobbs Act. The Court therefore reversed the judgment of RICO liability, which had rested on 121 purported predicate acts. 537 U.S. at 397. This Court wrote that "*all* of the predicate acts supporting the jury's finding of a RICO violation must be reversed," "the judgment that petitioners violated RICO must also be reversed," and the injunction "must necessarily be vacated." *Id.* at 411 (emphasis added).

On remand, however, the Seventh Circuit disagreed. It held that four of the 121 predicate acts were unaffected by this Court's decision; that the judgment that petitioners violated RICO might remain intact after all; and that the nationwide injunction predicated on that judgment might also survive. The panel also concluded that the Hobbs Act might well criminalize the protesters' activities, advancing a reading of the statute that no appellate court has credited in the almost 60 years of the statute's existence. In its 2001 decision, the same panel had become the first appellate court in RICO's 30-plus-year existence to hold that a private plaintiff may secure injunctive relief under 18 U.S.C. § 1964. Reversal is required to enforce this Court's mandate, to correct the Seventh Circuit's unprecedented and misguided rulings, and to bring this litigation finally to an end.

A. Factual and Procedural Background

1. Petitioners Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are individuals who oppose abortion on moral and religious grounds. Petitioner Pro-Life Action League, Inc. (PLAL), is a nonprofit Illinois corporation. Operation Rescue, the petitioner in No. 04-1352, is an unincorporated organization. Respondents the National Organization for Women, Inc. (NOW), Delaware Women's Health Organization, Inc. (DWHO), and Summit Women's Health Organization, Inc. (Summit), are, respectively, a national nonprofit organization

that supports the legal availability of abortion and two affiliated clinics that perform abortions.

In 1986, respondents initiated this lawsuit in the United States District Court for the Northern District of Illinois against petitioners (and various others who ceased to be defendants before trial). In their amended complaint, respondents asserted claims on behalf of two putative nationwide classes: all women's health centers at which abortions are performed (represented by DWHO and Summit); and (represented by NOW) all non-NOW members "whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by [petitioners'] unlawful activities." 04-1244 Pet. App. 170a n.12. See page ii, *supra*. Invoking a variety of novel theories of liability, virtually all of which would be shown over the next two decades of litigation to be legally invalid or factually unsupported, respondents alleged violations of the Sherman Act (15 U.S.C. § 1), RICO (18 U.S.C. §§ 1961-1968), and state law.

In their RICO claims, respondents alleged that petitioners had formed a loose association-in-fact of individuals and groups known as the Pro-Life Action Network (PLAN), united by a common ideological purpose of opposing abortion. They further alleged that PLAN was a RICO "enterprise" and that petitioners, by engaging in protests aimed at disrupting and closing abortion clinics, had directly or indirectly participated in the conduct of PLAN's activities through a "pattern" of "racketeering activity" (18 U.S.C. § 1962(c)). The pattern allegedly included acts of "extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951. In addition to their Section 1962(c) claim, respondents alleged RICO claims for conspiracy (in violation of 18 U.S.C. § 1962(d)) and for deriving "income" from a pattern of racketeering activity (in violation of 18 U.S.C. § 1962(a)). Respondents' novel Section 1962(a) claim was based on petitioners' receipt of voluntary contributions from their political supporters, which respondents claimed was "income derived" from a pattern of racketeering activities because the supporters were motivated by petitioners' protest activities. Re-

spondents requested treble damages, costs, attorneys' fees, and (under the antitrust laws but not under RICO) an injunction.

The district court dismissed the complaint for failure to state a valid claim, 765 F. Supp. 937 (1991), and the Seventh Circuit affirmed, 968 F.2d 612 (1992). In upholding the dismissal of the antitrust claim, the court of appeals reasoned that the Sherman Act "was not intended to reach the activities of organizations espousing social causes." *Id.* at 618. In upholding the dismissal of the RICO claims under Sections 1962(c) and 1962(d), the Seventh Circuit held that RICO does not apply to defendants who commit "non-economic crimes * * * in furtherance of non-economic motives." *Id.* at 629.[1] This Court granted certiorari on the RICO "economic motive" issue, 508 U.S. 971 (1993), and reversed, 510 U.S. 249 (1994).

2. Following remand, respondents filed a third amended complaint. For the first time, they requested injunctive relief under RICO. In 1995, the trial court dismissed the claims against certain defendants, but not the remaining RICO claims against petitioners. 04-1244 Pet. App. 140a. The district court also held that respondents, as private parties, could obtain injunctive relief in a treble-damages action brought under RICO, 18 U.S.C. § 1964(c). 04-1244 Pet. App. 119a-122a.[2]

3. The case was tried from March 4 to April 20, 1998. Evidence was presented concerning numerous incidents spanning the nationwide conduct of petitioners and thousands of

[1] On other grounds, the Seventh Circuit upheld the dismissal of respondents' RICO claim under 18 U.S.C. § 1962(a). See 968 F.2d at 623-24.

[2] Several years later, the district court certified the two classes described above. 172 F.R.D. 351, 363 (1997). The class of putative clinic patients who were not members of NOW sought only injunctive relief and was certified under Rule 23(b)(2); the clinic class, which also sought treble damages, was certified under Rules 23(b)(2) and (b)(3). See 172 F.R.D. at 362-63 & n.8. Thereafter certain defendants – including Operation Rescue but not the other petitioners – moved for summary judgment. In partially granting that motion, the court held that respondents had failed to raise any triable issue of fact on some of their more inflammatory claims, including alleged predicate acts of murder, kidnaping, and arson. 1997 WL 610782, at *18 (Sept. 23, 1997).

other abortion protesters over a 15-year period. 04-1244 Pet. App. 33a ("hundreds of acts").[3] The jury returned a verdict for respondents on their RICO claim under Section 1962(c).

The somewhat confusing verdict form can be read – favorably to respondents – to mean that the jury found that petitioners or unnamed persons "associated with PLAN" had committed 121 predicate acts under RICO: 21 "[a]cts or threats involving extortion against a[] patient, prospective patient, doctor, nurse, or clinic employee" in violation of the Hobbs Act, 18 U.S.C. § 1951; 25 violations of state extortion law; 25 acts of conspiracy to violate federal or state extortion law; 23 extortion-related violations of the Travel Act, see 18 U.S.C. §§ 1952(b), 1961(1)(A); 23 attempts to violate the Travel Act; and four acts or threats of physical violence to any person or property in violation of the Hobbs Act, 18 U.S.C. § 1951.[4] The

[3] Consistent with its summary judgment ruling, the district court instructed the jury that there was "no claim in this case" that the "defendants themselves are responsible for" any "incident[] of murder, arson, and bombing." 04-1244 Pet. App. 178a (Tr. 4939). The court also ruled that respondents could not suggest to the jury that petitioners had committed arson or murders – a prohibition that respondents' counsel repeatedly violated in her opening statement, leading the judge at sidebar to admonish her to obey his ruling. See Tr. 534 (sustaining objection to references to bombing and burning of clinics, kidnaping, and death threats), 535 (same for references to bombers and arsonists), 539 (Court to respondents' counsel: "You know what the instructions are, and I expect you to abide by them"), 543 (Court to respondents' counsel: "There is to be no reference to arson or murder during the opening statements, period").

[4] The special verdict form allowed the jury to make a finding of whether petitioners ("or any other person associated with PLAN") committed not only acts or threats of "extortion" in violation of the Hobbs Act but also "[a]cts or threats of physical violence to any person or property." 04-1244 Pet. App. 191a; see also *id.* at 192a (asking jury to indicate whether any two or more of these acts were committed during a 10-year period and constituted a pattern of racketeering activity). As explained in our reply at the petition stage (at 7-8 & n.5, 8a-10a), petitioners clearly objected to this aspect of the special verdict form, but the trial court – in response to the argument of respondents' counsel that the Hobbs Act reaches freestanding acts or threats of violence – overruled the objection. See Tr. 4575-79. Also over petitioners'

jury awarded $31,455.64 to DWHO in damages and $54,471.28 to Summit; pursuant to RICO, the damages were trebled. The court later denied post-trial motions and entered a broad nationwide injunction regulating petitioners' future protest activities at abortion clinics. 04-1244 Pet. App. 141a-174a.

4. On appeal, a different panel affirmed. 04-1244 Pet. App. 30a-61a. In holding that injunctive relief is available to a private litigant under RICO, 18 U.S.C. § 1964(c), the panel disagreed with *Religious Tech. Ctr.* v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). 04-1244 Pet. App. 35a-43a. The panel also rejected petitioners' arguments that they could not have violated the Hobbs Act because, among other things, they had not "obtained" any "property" of the clinics, the doctors who worked there, or the clinics' customers. *Id.* at 58a-59a. The court asserted that the clinics' "intangible property * * * right to conduct a business" was "'property' under the Hobbs Act" and "[a] loss to, or interference with the rights of, the victim is all that is required." *Id.* at 59a (internal quotations omitted).

B. This Court's Decision in *Scheidler II*

This Court reversed, holding that petitioners' actions did not constitute extortion within the meaning of the Hobbs Act because petitioners had not wrongfully "obtained" any "property" as required by 18 U.S.C. § 1951(b)(2). 537 U.S. at 402. The Court noted that the Hobbs Act drew its definition of extortion from the Penal Code of New York and the Field Code, a 19th-century model penal code. *Id.* at 403. Under New York law, "obtaining" property required both a deprivation and an acquisition of property. *Id.* at 403-04. The Court rejected the argument that "merely interfering with or depriving someone of property is sufficient to constitute extortion." *Id.* at 405.

A contrary holding, the Court emphasized, would extend the Hobbs Act to the separate crime of coercion, which "involves the use of force or threat of force to restrict another's freedom of action." 537 U.S. at 405. New York law had established coercion as a separate and lesser offense from extortion, and the Court determined that Congress "deci[ded] * * * to omit coercion" from the scope of the Hobbs Act. *Id.* at 406, 408. That decision – along with the rule of lenity – required reading the statute not to cover mere coercion. *Id.* at 409.

The Court then rejected all of the other predicate acts that had served as the basis for the RICO violation and the nationwide injunction. The Court ruled that the state-law extortion counts were legally defective, as were the 46 violations and attempted violations of the Travel Act. 537 U.S. at 409-10. The Court concluded that "*all* of the predicate acts supporting the jury's finding of a RICO violation must be reversed," and that, therefore, the RICO "judgment * * * must also be reversed" and the injunction "must necessarily be vacated." *Id.* at 411 (emphasis added). With no legal basis for a RICO injunction, the Court stated that it "need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." *Ibid.*

C. The Seventh Circuit's Decision on Remand

1. One year after this Court's decision, the panel entered an unpublished order on remand. 04-1244 Pet. App. 25a-29a. The panel held that this Court's decision left undisturbed four predicate acts found by the jury – those involving "acts or threats of physical violence to any person or property" in pur-

---

objections, the jury was instructed that "property" for purposes of all of the Hobbs Act counts broadly included "anything of value, including a woman's right to seek services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion, and fear." 04-1244 Pet. App. 182a. The supposed finding of 121 predicate acts assumes, counterfactually, that there was no overlap among the acts found to constitute several different categories of "extortion" (whereas respondents have conceded that there was in fact substantial overlap, see 01-1118 and 01-1119 Resp. Merits Br. 3 & n.4, 35 & n.45). That number also assumes, dubiously, that category 4(e) on the form – "[a]cts or threats of physical violence to any person or property" – constitutes and was intended to constitute a separate category of RICO predicate acts. The relevant jury instructions, as well as the special verdict form, are reprinted at 04-1244 Pet. App. 178a-195a.

ported violation of the Hobbs Act. In the panel's view, this Court could not "have found these four predicate acts insufficient to support the district court's injunction," because the only Hobbs Act question the Court had accepted for review was "'whether petitioners committed extortion within the meaning of the Hobbs Act.'" *Id.* at 28a (quoting 537 U.S. at 397).

The panel concluded that it was possible that the four supposedly surviving predicate acts might be "sufficient to support the nationwide injunction," and remanded that issue to the district court. 04-1244 Pet. App. 28a. The panel said nothing to reconcile its remand instructions with this Court's statements that the injunction "must necessarily be vacated" and that the underlying RICO judgment "must also be reversed." 537 U.S. at 411. The panel said that the district court "may need to determine whether the phrase 'commits or threatens physical violence to any person or property' constitutes an independent ground for violating the Hobbs Act or, rather, relates back to the grounds of robbery or extortion." 04-1244 Pet. App. 29a.

2. Petitioners sought rehearing, arguing, among other things, that the order on remand was at odds with the unambiguous mandate in *Scheidler II*, and that, alternatively, the court should decide whether the Hobbs Act reaches acts or threats of violence to property or persons unconnected to extortion or robbery. No appellate court, petitioners explained, had interpreted the statute as punishing freestanding acts or threats of violence to persons or property – and the Ninth Circuit has rejected that reading as "fatally flawed" and "without merit." *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (1999); accord *United States* v. *Franks*, 511 F.2d 25 (6th Cir.), cert. denied, 422 U.S. 1042 (1975).

3. Panel and en banc rehearing were denied over three dissenting votes. 04-1244 Pet. App. 1a-24a. The panel offered no further explanation concerning how its remand order could be reconciled with *Scheidler II*. The panel stated that it had "nothing to add on that point to what we have already written," except to reiterate that this Court could not have reached these

four counts because "they were not included in the petitions for *certiorari*." 04-1244 Pet. App. 7a. Instead, the new opinion primarily addressed "whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO." *Id.* at 7a-8a. The panel purported not to resolve that issue conclusively but devoted ten full pages to criticizing many of petitioners' arguments. *Id.* at 6a-15a.

Among other things, the panel suggested that the language of the Hobbs Act is ambiguous (04-1244 Pet. App. 8a):

> Whoever in any way or degree [1] obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or [2] attempts or conspires so to do, or [3] commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section* shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). "[T]here are two possible interpretations" of the third clause, the panel stated, and "[t]he choice between [them] * * * is not obvious." 04-1244 Pet. App. 8a. Later the panel went even further, suggesting that reading the third clause as punishing freestanding acts or threats of violence would be to "take it at face value." *Id.* at 15a.

The panel quoted a sentence from *Stirone* v. *United States*, 361 U.S. 212 (1960), which observed that the Hobbs Act "speaks in broad language, manifesting a purpose to *use all the constitutional power Congress has* to punish interference with interstate commerce by extortion, robbery *or physical violence*." *Id.* at 215 (emphasis added). According to the panel, the quoted sentence "suggests that the Court saw three distinct types of predicate acts in the statute." 04-1244 Pet. App. 9a. The panel acknowledged that the Sixth and Ninth Circuits have rejected a violence-only reading of the Hobbs Act, *id.* at 11a, but the panel claimed a conflict between those decisions and the unpublished opinion in *United States* v. *Milton*, 1998 WL 468812 (4th Cir. Aug. 4, 1998), which neither party had cited.

Finally, the panel turned to the "legislative history." 04-1244 Pet. App. 15a. It acknowledged that the Hobbs Act, as enacted in 1946, "*explicitly linked* the 'acts of physical violence' clause to the prohibition on robbery and extortion." *Ibid.* (emphasis added). According to the panel, however, when Congress in 1948 approved a general revision and codification of the entirety of Title 18, it may have altered the Hobbs Act by expanding it to cover freestanding acts or threats of violence. The panel acknowledged that the 1948 "revisions were intended to be formal, stylistic changes," but suggested that "the revisers may have made certain substantive changes, either advertently or inadvertently." 04-1244 Pet. App.15a.

Despite its detailed discussion of the Hobbs Act's meaning, the panel purported not to reach a resolution of the issue. 04-1244 Pet. App. 6a-7a, 15a-16a. The panel also said it might be unnecessary for the district court to resolve the Hobbs Act issue. *Id.* at 7a-8a, 16a. "[O]nly if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury," the panel said, will that court "have to confront" the Hobbs Act question. *Id.* at 7a. The panel emphasized the limited nature of what remained open on remand. "[I]t is too late in the day," the panel thus explained, "for the [respondents] to try to prove an entitlement to damages associated with" the four supposedly surviving Hobbs Act predicates. *Id.* at 7a. Respondents "had their chance to do so when the case was tried in the district court, and there is nothing in the Supreme Court's opinion that would justify reopening the original judgment on this point." *Ibid.* It is too late, the panel also held, "for plaintiffs to seek additional damages relief for acts they could have addressed at the original trial." *Id.* at 16a. Thus, the panel made clear that no damages can be awarded and that a new trial is not an available option.

4. Judge Manion, joined by Judge Kanne, dissented from the denial of rehearing en banc. 04-1244 Pet. App. 17a-24a.[5]

[5] Chief Judge Flaum also voted to grant rehearing en banc, but he did not join the dissenting opinion.

In the dissenters' view, the panel's decision "directly conflicts with the Supreme Court's opinion," "rests on an impermissible reading of the Hobbs Act, and unnecessarily revives a case that is already more than eighteen years old." *Id.* at 19a.

INTRODUCTION AND SUMMARY OF ARGUMENT

A panel of the Seventh Circuit declined simply to carry out this Court's clear mandate in *Scheidler II* – and instruct the district court to enter judgment in petitioners' favor. The panel left open the possibility that four supposedly surviving predicate acts might state a violation of the Hobbs Act – and the district court might, on that basis, uphold the nationwide injunction it had issued (or reenter a narrower injunction). To reach that conclusion, the Seventh Circuit disregarded this Court's unambiguous mandate in *Scheidler II*, and endorsed theories of substantive criminal liability under the Hobbs Act and remedial authority under RICO that no appellate court had accepted in many decades of experience with those statutes. The decision below should be reversed with instructions to remand the case to the district court for entry of judgment in petitioners' favor.

I. *Scheidler II* made clear that "all" of the RICO predicates were "reversed"; that the judgment of liability under RICO "must also be reversed"; and that the injunction entered against petitioners "must necessarily be vacated." 537 U.S. at 411. The panel was wrong to second-guess those holdings as well as to ignore the significance of this Court's decision to avoid the RICO injunction issue in *Scheidler II*. The panel's reasons for looking behind this Court's clear commands rest on a misreading of this Court's opinion, a misunderstanding of how *Scheidler II* was litigated in this Court at the petition and merits stages, and an unduly restrictive view of this Court's practice of confining itself to issues that are "fairly included" within the questions presented (S. CT. RULE 14.1(a)). Beyond that, the panel's conclusion that the liability judgment and an injunction might somehow survive *Scheidler II* ignores well-settled

principles governing general verdicts that rest on multiple legal theories, where one or more of those theories is legally invalid.

II. The Hobbs Act does not criminalize acts or threats of physical violence wholly unconnected to either robbery or extortion. As the Seventh Circuit acknowledged, the text of the statute as enacted in 1946 unambiguously requires a connection to robbery or extortion. The panel erred in suggesting that Congress may have expanded criminal liability in 1948 when it adopted a revision and codification of all of Title 18. As this Court has repeatedly made clear, the strong presumption is that legislative revisions do *not* result in substantive changes, unless Congress clearly states otherwise. The Court has applied that presumption to the 1948 statute. Here, the accompanying Reviser's Notes confirm that no substantive change in criminal liability was intended.

Beyond that, the text and structure of Section 1951 as amended, as well as the legislative history of the Hobbs Act and its predecessor statute (the Anti-Racketeering Act of 1934), refute the Seventh Circuit's interpretation. The amended statute reaches acts or threats of violence only if undertaken "in furtherance of a plan or purpose to do anything in violation of this section" – a clear reference to the crimes of robbery or extortion previously set out in Section 1951. The clause prohibiting attempts and conspiracies, moreover, follows the same pattern by referring back to the crimes of robbery and extortion. In addition, Congress *twice* declined to create the crime the Seventh Circuit purported to locate in Section 1951 – in 1934, when it passed the Anti-Racketeering Act, and again in 1946, when it passed the Hobbs Act (which excluded the crime of coercion and expressly linked the violence clause to robbery or extortion). The Seventh Circuit's reading also violates the rule of lenity, conflicts with this Court's decisions involving the Hobbs Act (*Scheidler II* and *United States* v. *Enmons*, 410 U.S. 396 (1973)), is impossible to reconcile with the structure of the federal criminal code, threatens to federalize vast swaths of state criminal law (including almost all violent crime), and allows RICO to be misused against political and

labor protesters (again, contrary to Congress's intent). The reasons the Seventh Circuit offered for endorsing this novel construction of the Hobbs Act are all indefensible.

III. As this Court has repeatedly recognized, civil RICO was directly modeled on the federal antitrust laws. Specifically, Section 1964(c), which authorizes private civil lawsuits, is taken almost verbatim from a provision in the Clayton Act of 1914 (which in turn was modeled on a virtually identical provision in the Sherman Act of 1890). At the time RICO was enacted, this Court had interpreted the precursor Sherman Act provision *as not allowing private parties to seek injunctive relief*. Moreover, the text, structure, and legislative history of RICO all confirm that Congress intended to limit the relief available to private parties to the civil remedies specified in the statute: treble damages, costs and attorneys' fees. Allowing private injunctive relief would lead to a significant expansion of the scope of civil RICO by arming private litigants with a wide array of intrusive equitable remedies such as the appointment of monitors and trustees and even corporate dissolution.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S CLEAR MANDATE

This Court in *Scheidler II* unambiguously stated (537 U.S. at 411 (emphasis added in part)):

> Because ***all*** *of the predicate acts* supporting the jury's finding of a RICO violation *must be reversed, the judgment that petitioners violated RICO must also be reversed.* Without an underlying RICO violation, the *injunction* issued by the District Court ***must necessarily be vacated***. We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964.

This Court's mandate established three points with unvarnished clarity: (1) "*all* of the predicate acts supporting" the finding of a RICO violation "must be reversed"; (2) the judg-

ment of RICO liability entered against petitioners "must be reversed"; and (3) the injunction predicated on the now-reversed judgment "must necessarily be vacated." It is useful to examine the Seventh Circuit's reasons for disagreeing with each point.

A. "All" Of The RICO Predicates "Must Be Reversed"

The jury's determination that petitioners violated RICO rested on a "pattern of racketeering activity" that consisted of two or more of the following 121 supposed predicate acts: 21 "[a]cts or threats involving extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951; 25 violations of state extortion law; 25 acts of conspiracy to violate federal or state extortion law; 23 extortion-related violations of the Travel Act; 23 attempts to violate the Travel Act; and four acts or threats of physical violence to any person or property in violation of the Hobbs Act. 04-1244 Pet. App. 191a-192a. These 121 acts were "the predicate acts supporting the jury's finding of a RICO violation." 537 U.S. at 411. The Court left no doubt as to the disposition of the 121 RICO predicates, instructing that "all" of them "must be reversed." *Ibid.*

The panel gave several flawed reasons for disregarding this Court's holding concerning the proper disposition – reversal – of "all" of the 121 predicate acts. It first suggested that this Court's opinion "had nothing at all to say" about the four predicates in question. But the Court stated that "all" of the predicate acts found by the jury "must be reversed" – not "some," not "all the ones we have discussed," and certainly not "all but four." 537 U.S. at 411. The Court elsewhere made clear that its holding "with respect to extortion under the Hobbs Act" had the effect of "render[ing] insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." 537 U.S. at 397. The Court did not say that all of the "other bases or predicate acts" were invalidated *except for the four involving acts or threats of violence.*

As the dissenting judges correctly noted below, if there was any ambiguity in this Court's opinion, the proper course for respondents would have been "to seek rehearing from the

Supreme Court." 04-1244 Pet. App. 21a (dissenting opinion). Cf. *Parks* v. *Simpson Timber Co.*, 389 U.S. 909 (1967); *Union Trust Co.* v. *Eastern Air Lines, Inc.*, 350 U.S. 962 (1956). This they failed to do. Respondents should not be rewarded for their decision to take their chances with a panel that had ruled in their favor rather than ask for clarification by this Court.

In addition, the panel was wrong to suggest that the four acts of violence were *not* included in the petitions for certiorari.[6] On the contrary, both of the petitions for certiorari expressly referred to the four predicate acts involving "acts or threats of physical violence to any person or property in violation of the Hobbs Act." 01-1118 Pet. 5 n.3; see also 01-1119 Pet. 3-4 & nn.3-5. Indeed, the significance and status of these four predicate acts were debated by the parties at the petition stage. Thus, respondents argued that this Court should deny review of the Hobbs Act question because the jury found "4 violations of the Hobbs Act through acts or threats of physical violence," those predicate acts were "unchallenged" in the Supreme Court, and the case therefore was "an inappropriate vehicle for determining whether the Seventh Circuit's construction of the Hobbs Act was correct." 01-1118 and 01-1119 Br. in Opp. 5, 15.

In response, petitioners argued, among other things, that "*all* of the other predicate acts found by the jury" required "a showing of either 'robbery' (not alleged here) or 'extortion,'" because the Hobbs Act by its plain terms criminalizes acts or threats of violence *only* if they are committed "in furtherance of

---

[6] The Court treats issues as "fairly included" (S. CT. RULE 14.1(a)) when consideration of them is a "predicate to an intelligent resolution of the question presented" (*Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (internal quotations omitted)), or they are "inextricably linked to * * * the questions presented." *City of Sherrill* v. *Oneida Indian Nation*, 125 S. Ct. 1478, 1490 n.8 (2005). To resolve a case properly, the Court may decide an issue that is only "touched on" in the parties' briefs, *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43, 58 n.18 (1993), or even overlooked by the parties entirely. See *City of Sherrill*, 125 S. Ct. at 1490 n.8 ("We resolve this case on considerations not discretely identified in the parties' briefs."); *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996).

a plan or purpose" to violate Section 1951. 01-1118 Cert. Reply Br. 7-8 & n.11 (emphasis added) (citing *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (9th Cir. 1999)); accord 01-1119 Cert. Reply Br. 7 & n.13. Moreover, the Seventh Circuit's overbroad definition of "property" – which petitioners cited as a principal reason for granting review of the Hobbs Act issue (01-1118 Pet. 17-19) – applied with equal force to the four predicates involving acts or threats of violence against "property" or persons. For that reason as well, petitioners took the position in *Scheidler II* that these four predicate acts *were* "fairly included" (S. CT. RULE 14.1(a)).

At the merits stage, respondents shifted gears and made a strategic decision not only to *ignore* these four Hobbs Act predicates *but to treat them as inextricably tied to extortion*. Thus, although respondents included a detailed argument that the RICO judgment was valid and should be upheld "even apart from the Hobbs Act predicates," they pointedly did *not* argue that the judgment could stand because the jury found four Hobbs Act violations that were unrelated to extortion. 01-1118 and 01-1119 Resp. Merits Br. 33-35. In fact, faced with the jury's failure to specify which two or more of the 121 predicate acts constituted the requisite "pattern" of racketeering activity, respondents contended that the RICO judgment could stand "even apart from the Hobbs Act predicates" because "*all* of the acts that supported the jury's finding as to Hobbs Act violations" – including, of course, the four predicates at issue – *also* supported its findings as to state law [extortion] violations" (so that "the jury unquestionably would have found a pattern if only state extortion were at issue"). 01-1118 and 01-1119 Resp. Merits Br. 35. That argument, of course, *presupposed* that the four acts or threats of violence *were in fact related to extortion*.

Respondents' strategy helps explain why this Court in *Scheidler II* saw no need to state expressly that its resolution of the extortion issue also rendered the four violence counts legally insufficient. The Court quite properly would have assumed that the issue was simply no longer in dispute. See 04-1244 Pet. App. 21a (dissent) (because respondents at the merits stage "did

not argue that the four predicate acts of violence * * * independently justified the jury's verdict[,] * * * the Supreme Court found no need to expressly address that question").[7]

Moreover, even if the Hobbs Act question cannot be read as "fairly including" the four predicates at issue, the panel was wrong to presume that this Court did not go "beyond the scope of its grant of certiorari." 04-1244 Pet. App. 28a. It is *undeniable* that this Court *did* go beyond the scope of its grant of certiorari in *Scheidler II* – by resolving the legality of the state-law extortion counts and the Travel Act counts. Notably, the validity of the state-law extortion counts was raised as a *separate* issue in Operation Rescue's petition for certiorari, but the Court did not grant that issue. See 01-1119 Cert. Pet. i; 535 U.S. 1016 (2002). The Court nonetheless reached and resolved that issue, holding that the state-law extortion counts were legally defective.

---

[7] For the same reason, the Court saw no reason to mention the four violence counts in its listing of the predicate acts that the jury had, "*inter alia*," found as potentially being included within the "pattern of racketeering activity." 537 U.S. at 399. Respondents' suggestion (Br. in Opp. 9, 15) that this Court somehow overlooked the existence of these four predicates is utterly implausible given the multiple references to the four predicates in the briefs at the petition and merits stages as well as at oral argument. See 04-1244 Pet. 15 (citing references); 04-1244 Petitioners' Reply Br. 3 n.1 (citing additional references); Oral Arg. Tr. 62. Many of these references were quite prominent, because respondents repeatedly sought to portray the protests giving rise to this litigation as violent, and petitioners repeatedly countered that the jury had found *only four* acts or threats of violence against people or property by unnamed participants in the protests. Respondents' contention that this Court's opinion is silent concerning these four predicates also ignores this Court's observation that "New York case law applying the coercion statute before the passage of the Hobbs Act involved the prosecution of individuals who, *like petitioners*, employed threats and acts of force *and violence* to dictate and restrict the actions and decisions of businesses." 537 U.S. at 405-06 (emphasis added). Thus, the panel was wrong to say that this Court's opinion "makes no mention of these four predicate acts." 04-1244 Pet. App. 5a. Any suggestion that this Court overlooked these four predicates was, in any event, properly directed to this Court in a rehearing petition.

B. The "Judgment" Of Liability Under RICO "Must Also Be Reversed"

"[T]he judgment that petitioners violated RICO must also be reversed." 537 U.S. at 411. Despite this clear instruction, the Seventh Circuit suggested that the liability judgment against petitioners might survive if the district court, on remand, ruled that the Hobbs Act reaches freestanding acts or threats of violence. 04-1244 Pet. App. 4a-5a. That is the inescapable import of the panel's statement that the district court should "determine whether the four predicate acts * * * are sufficient to support the nationwide injunction that it imposed." *Id.* at 5a. No injunction could be entered in the absence of a judgment that petitioners violated RICO in the first place. See *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 546 n.12 (1987).

There is, however, no ambiguity in this Court's direction that the liability judgment "must also be reversed." 537 U.S. at 411. When this Court wants to reverse a judgment only in part, it says so – which it did not do here. See, *e.g.*, *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993) ("It may be, of course, that even though the District Court had jurisdiction over the state-law claims, judgment on those claims alone cannot support the injunction that was entered. We leave that question for consideration on remand."). And, if there had been any possibility that the finding of a RICO violation could have survived and the district court's injunction upheld on an alternative basis, this Court would not have stated that it need not address the second question presented. 537 U.S. at 411.

The panel's suggestion that the liability judgment might somehow survive this Court's decision in *Scheidler II* is wrong *even if* this Court did *not* dispose of the four "violence-only" predicates. Under settled precedent, a general verdict that might have rested on legal error – as where one of several alternative liability theories that was charged is legally defective – must be reversed. See *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *Yates* v. *United States*, 354 U.S. 298 (1957); *Maryland* v. *Baldwin*, 112

U.S. 490, 493 (1884); see also *Griffin* v. *United States*, 502 U.S. 46, 56, 58-59 (1991).[8] This Court recognized this fatal defect in the general verdict that petitioners violated RICO. See 537 U.S. at 401 n.5; see also 04-1244 Pet. App. 22a n.2 (dissent) (noting absence of requisite finding by jury that these four predicate acts satisfied the Hobbs Act's jurisdictional element).

C. The Injunction "Must Necessarily Be Vacated"

"Without an underlying RICO violation, the injunction issued by the District Court *must necessarily be vacated*." 537 U.S. at 411 (emphasis added). Despite this clear command, the panel stated that the district court on remand should "determine whether the four predicate acts * * * are sufficient to support the nationwide injunction that it imposed." 04-1244 Pet. App. 5a. In denying the petitions for rehearing, the panel also suggested that the district court might consider whether the four predicates "could support *a more narrow* injunction." *Id.* at 6a (emphasis added). The opinion on rehearing left open the possibility that the district court might conclude that its original injunction be continued, while at the same time offering that "it appears that it would be an abuse of discretion for the district court to re-enter *any* nationwide injunction based only on the four remaining acts." *Id.* at 16a (emphasis added).

As the dissenting judges observed, the panel's suggestion that the district court's original injunction might survive or be "re-enter[ed]" following remand "directly conflicts with the Supreme Court's opinion." 04-1244 Pet. App. 16a, 19a. The injunction, this Court made clear, "must necessarily be vacated." 537 U.S. at 411.[9] Had there been any possibility that the

---

[8] This rule was brought to the Court's attention in *Scheidler II*. See 01-1118 Pet. Merits Br. 17 n.12; 01-1118 Pet. Merits Reply Br. 13-14. At oral argument, the Court asked the Solicitor General whether the judgment could stand and he agreed that, under these cases, it could not. See Oral Arg. Tr. 30-31.

[9] When the Court recognizes that there are alternative grounds on which an injunction might be sustained on remand, or that further fact-finding is required, it typically says so when it vacates the injunction. See, *e.g.*, *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 151 (1988); *Morales* v. *Trans*

injunction might survive in any form, this Court would not have avoided the issue of injunctive relief under RICO.

II. THE HOBBS ACT DOES NOT MAKE ACTS OR THREATS OF VIOLENCE UNCONNECTED TO ROBBERY OR EXTORTION A FEDERAL CRIME

The Hobbs Act makes it a felony punishable by imprisonment for up to 20 years "in any way or degree [to] obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce" by acts of extortion or robbery (or through attempts or conspiracies to commit extortion or robbery). 18 U.S.C. § 1951(a). It also proscribes any act or threat of "physical violence to any person or property" that is done "in furtherance of a plan or purpose *to do anything in violation of this section*." *Ibid.* (emphasis added). Relying on the assumption that obstructing, delaying or affecting commerce could be a "violation of this section" (see 04-1244 Pet. App. 8a, 10a, 14a), the Seventh Circuit held that the Hobbs Act could reasonably be interpreted as proscribing violence (or threats of violence) that affect interstate commerce but are unconnected to either extortion or robbery. In the 59 years since the Hobbs Act was enacted, no appellate court has endorsed that far-reaching and countertextual reading – and two circuits have rejected it. *United States* v. *Yankowski*, 184 F.3d 1071, 1072, 1073 (9th Cir. 1999); *United States* v. *Franks*, 511 F.2d 25, 31 (6th Cir. 1975). As we explain below, the Seventh Circuit's reading is wrong for multiple reasons.

A. The Seventh Circuit's Interpretation Is Inconsistent With The Text, Structure, And Legislative History Of The Hobbs Act

1. An examination of the text of the Hobbs Act – both as originally enacted in 1946 and as subsequently amended – makes very clear that it was never intended to criminalize freestanding acts or threats of violence. The Hobbs Act was passed in 1946 as a substitute for the Federal Anti-Racketeering

---

World Airlines, Inc., 504 U.S. 374, 382 (1992).

Act of 1934. See Act of July 3, 1946, ch. 537, 60 Stat. 420 (App., *infra*, 2a-3a); Act of June 18, 1934, ch. 569, 48 Stat. 979 (App., *infra*, 3a-4a). As originally enacted, the Hobbs Act included a first section that defined "commerce," "robbery," and "extortion" and then provided in pertinent part as follows:

> SEC. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> SEC. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of section 2* shall be guilty of a felony.

Pub. L. No. 486, 60 Stat. 420 (1946) (emphasis added).

The italicized language says that acts or threats of "physical violence to any person or property" under Section 5 are punishable only if done "in furtherance of a plan or purpose to violate" Section 2 – to violate, in other words, the proscription stated in Section 2 against interfering with commerce by either extortion or robbery. As the panel was constrained to admit, then, the Hobbs Act, as enacted in 1946, "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." 04-1244 Pet. App. 15a.

The Seventh Circuit, however, suggested that Congress may have altered this meaning and created new felony offenses when, in 1948, it approved a general revision and codification of the entirety of Title 18. As revised in 1948 and subsequently amended, the Hobbs Act provides in pertinent part:

> Whoever in any way or degree [1] obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or [2] attempts or conspires so to do, or [3] commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section* shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added).

The panel acknowledged that the 1948 "revisions were intended to be formal, stylistic changes," but suggested that the meaning of the statute *did* change in 1948. 04-1244 Pet. App. 15a. That conclusion is incompatible with the statutory text. The Hobbs Act, as amended, punishes only acts or threats of "physical violence to any person or property" that are "in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. § 1951(a). The rest of "this section" – Section 1951 – obviously deals with the interference with interstate commerce by acts connected to either robbery or extortion.

The structure of Section 1951(a) confirms this commonsense reading. As the language quoted above makes clear, Section 1951(a) consists of three clauses (represented by the bracketed numbers that have been added to the quotation). Each begins with a verb or series of verbs cast in the present tense; each modifies the word "whoever." The second clause – which independently punishes attempts and conspiracies – refers back to and is entirely dependent on the first clause (which sets forth the primary offenses of robbery or extortion). In like manner, the third clause refers back to the first clause and the primary offenses of robbery or extortion. The primacy of robbery and extortion is further confirmed by the fact that those terms are specifically defined in Section 1951(b) – whereas the ancillary "physical violence" offense in the third clause is not. Only by ignoring this structural evidence and the parallelism of the verbs used in Section 1951 could the Seventh Circuit have concluded that the principal offense targeted by the Hobbs Act was

interference with commerce (with "by robbery or extortion" being one of three alternative means of carrying out that crime). Contrary to the Seventh Circuit's assumption, "obstruct[ing], delay[ing], or affect[ing] commerce" does not constitute a "violation of this section" within the meaning of third clause.

Other appellate courts have not made the same mistake. As the Ninth Circuit explained, "The statutory language is clear: A person may violate the Hobbs Act by committing or threatening a violent act against person or property, but only if it is in furtherance of a plan to interfere with commerce *by extortion or robbery*." *Yankowski*, 184 F.3d at 1073 (emphasis in original).

In an official publication to guide federal prosecutors, the Justice Department has recognized that the Hobbs Act does not reach freestanding acts or threats of violence:

> The statutory prohibition of "physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section" *is confined to violence for the purpose of committing robbery or extortion. United States v. Franks*, 511 F.2d 25, 31 (6th Cir. 1975) (rejecting the view that the statute proscribes all physical violence obstructing, delaying, or affecting commerce as contrasted with violence designed to culminate in robbery or extortion).

U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 2402 (1997) (emphasis added) (available at <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02402.htm>).

2. The Seventh Circuit's suggestion that Section 19[illegible]a) could be read to have a different meaning than its source – the 1946 Hobbs Act – is also flatly inconsistent with this Court's decisions. This Court has long recognized that it "will *not* be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention *be clearly expressed*." *United States* v. *Ryder*, 110 U.S. 729, 740 (1884) (emphasis added). Congress itself "recognized this rule by including in its reports the complete Reviser's Notes to each

section in which are noted all instances where change is intended and the reasons therefor." Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439, 446 (1948-1949); see also *Muniz* v. *Hoffman*, 422 U.S. 454, 469, 474 (1975). This Court's decisions have repeatedly applied that interpretive canon to the 1948 revisions of Title 18. See, *e.g.*, *Muniz*, 422 U.S. at 468-70, 474; *United States* v. *Cook*, 384 U.S. 257, 260 (1966); *Morissette* v. *United States*, 342 U.S. 246, 269, n.28 (1952) ("The 1948 Revision was not intended to create new crimes but to recodify those then in existence."). Under these settled principles, no substantive change in the law was brought about by the 1948 revisions unless the detailed Reviser's Notes indicate that "a substantive change in the law was contemplated." *Muniz*, 422 U.S. at 474. The Seventh Circuit thus got it backwards in attaching significance to the fact that, as far as it could tell, Congress had "never affirmatively negated" the panel's preferred reading of the Hobbs Act. 04-1244 Pet. App. 15a.

Significantly, the Reviser's Notes in no way suggest an intent to alter the substantive scope of the Hobbs Act's provisions. See 18 U.S.C. App. (Reviser's Notes) 2444, 2591-92 (1948). On the contrary, they make clear that the revised Section 1951 merely "consolidate[d] sections 420a–420e-1 of title 18, U.S.C., 1940 ed." – the provisions that codified the Anti-Racketeering Act of 1934, which the Hobbs Act amended – and did so "with changes in phraseology and arrangement necessary to effect consolidation." 18 U.S.C. App. (Reviser's Notes), at 2591. The balance of the Reviser's Notes relating to Section 1951 provide these comments on specific changes:

> Provisions designating offense as felony were omitted as unnecessary in view of definitive section 1 of this title. (See reviser's note under section 550 of this title.)
>
> Subsection (c) of the revised section is derived from title II of the 1946 amendment. It substitutes references to specific sections of the United States Code, 1940 ed., in place of references to numerous acts of Congress, in conformity to the style of the revision bill. Subsection (c) as rephrased will preclude any construction of implied repeal of the specified acts of Congress codified in the sections enumerated.
>
> The words "attempts or conspires so to do" were substituted for sections 3 and 4 of the 1946 act, omitting as unnecessary the words "participates in an attempt" and the words "or acts in concert with another or with others," in view of section 2 of this title which makes any person who participates in an unlawful enterprise or aids or assists the principal offender, or does anything towards the accomplishment of the crime, a principal himself.
>
> Words "shall, upon conviction thereof," were omitted as surplusage, since punishment cannot be imposed until a conviction is secured.

Id. at 2591-92. Thus, there is nothing in the Reviser's Notes to suggest an intent to dispense with the requirement that acts or threats of violence be in furtherance of robbery or extortion. See also *United States* v. *Kemble*, 198 F.2d 889, 889 n.1 (3d Cir.), cert. denied, 344 U.S. 893 (1952) (1948 statute "reenacted" the "substance" of the 1946 statute "without consequential change").

3. Several additional factors provide further support for reading Section 1951 as prohibiting only those threats or acts of violence committed in furtherance of a plan or purpose to interfere with commerce by robbery or extortion.

First, as this Court has explained, Congress's purpose in enacting the Hobbs Act was not only to "delete[]" an "exception" to the predecessor Anti-Racketeering Act that had been recognized by this Court in *United States* v. *Local 807*, 315 U.S. 521 (1942), but also to "substitute[] specific prohibitions on robbery and extortion" as those crimes were defined under New York law "for the Anti-Racketeering Act's language relating to the use of force or threats of force." *United States* v. *Culbert*, 435 U.S. 371, 377 (1978); see also *id.* at 377-78 (collecting evidence of Congress's intent, which was "to prohibit robbery or extortion perpetrated by anyone"). Toward

that end, Congress not only specifically tied the "physical violence" clause to the core proscriptions against robbery and extortion but also made a "decision to * * * omit coercion" from the scope of the statute. 04-1244 Pet. App. 9a; accord *Scheidler II*, 537 U.S. at 403, 405-06. As the panel acknowledged (04-1244 Pet. App. 9a, 10a), the crime of coercion under New York law included certain wrongful uses of "violence" or "threat[s]" of violence against "person[s]" or "property," even if wholly unconnected to either extortion or robbery. See also *Scheidler II*, 537 U.S. at 405 n.10 (quoting definition of coercion in N.Y. PENAL LAW § 530 (1909)); App., *infra*, 4a (reprinting § 530). The panel's interpretation of Section 1951 is thus contrary to Congress's intent to target robbery and extortion and to exclude from the Hobbs Act conduct unrelated to robbery or extortion that was punishable as coercion under New York law. 537 U.S. at 405-08.[10]

Second, Congress's intent not to criminalize freestanding acts or threats of violence against persons or property is equally apparent from the legislative history of the 1934 Act. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 232–33 (1998) (relying on previous version of criminal statute to interpret the current version); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 526 (2001) (same). As enacted, the 1934 Act covered acts and threats of physical violence only if committed "in furtherance of a plan or purpose to violate" the proscriptions against the wrongful obtaining of another's property or wrongful compelling of another's "payment of money or other valuable consideration[]" or "purchase or rental of property or protective services." 48 Stat. 979, § 2(c); see App., *infra*, 3a-4a

[10] The congressional debates involving the Hobbs Act and a predecessor bill contain further evidence that Members were aware that the statute would reach violence only if it was committed in furtherance of robbery or extortion. See, *e.g.*, 91 CONG. REC. 11,908 (1945) ("[A] mere threat does not constitute a crime. There must accompany that threat an unlawful taking."); 89 CONG. REC. 3227 (1943) ("Let us remember that we are not attempting to forbid all kinds of violence. We are trying to make a legal definition of racketeering.").

(reprinting 1934 Act); *Yankowski*, 184 F.3d at 1073 n.5. Moreover, the final version of the 1934 Act substantially narrowed the original bill's language, which would have made it a crime to "commit[] or threaten[] to commit any act of violence * * * to a person or property" in "connection with or in relation to any act in any way * * * affecting * * * commerce." S. 2248, 73d Cong., 2d Sess. § 2(1) (1934) (reprinted at 78 CONG. REC. 5734); see also *Callanan* v. *United States*, 364 U.S. 587, 590 n.4 (1961).

Thus, Congress *twice* declined to create the crime the Seventh Circuit purported to locate in the Hobbs Act – in 1934 and again in 1946. In light of this history, the panel's suggestion that Congress "advertently or inadvertently" intended to expand the Hobbs Act in 1948 (04-1244 Pet. App. 15a) is utterly implausible. Congress did not create this crime in a nonsubstantive, general revision and recodification of Title 18 in 1948.

B. The Seventh Circuit's Interpretation Should Be Rejected For Other Reasons As Well

The Seventh Circuit's reading of Section 1951 suffers from many additional flaws: it ignores the rule of lenity, conflicts with this Court's decisions involving the Hobbs Act, cannot be reconciled with the structure of the federal criminal code, could federalize vast expanses of state criminal law, and allows RICO to be misused against political and labor protesters.

1. Even if our reading of Section 1951(a) is not compelled by the foregoing evidence (and we believe that it is), our view is at the very least a reasonable one. The panel itself called our reading a "possible" one and said that the text of Section 1951 "can be read either way." 04-1244 Pet. App. 8a. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) (citing *Bell* v. *United States*, 349 U.S. 81, 83 (1955)). That rule of lenity applies with full force to the substantive (as opposed to jurisdictional) provisions of the Hobbs Act. *Scheidler II*, 537 U.S. at 408-09 (applying rule of lenity to definition of extortion). As the Court recognized in *Cleveland*

v. *United States*, 531 U.S. 12, 25 (2000), "[t]his interpretive guide is especially appropriate" in construing the Hobbs Act, because, like the mail fraud statute at issue in that case, the Hobbs Act "is a predicate offense under RICO." Accord *Scheidler II*, 537 U.S. at 411-12 (Ginsburg, J., joined by Breyer, J., concurring). The rule of lenity should be dispositive here.[11]

2. The panel's analysis also is inconsistent with two of this Court's decisions involving the Hobbs Act. First, *United States* v. *Enmons*, 410 U.S. 396 (1973), reversed the Hobbs Act convictions of labor union officials and members who had engaged in acts of violence and destruction of property during a campaign to induce an employer to agree to a union contract. Although the defendants had fired high-power rifles at the employer's facility, and even blown up a company transformer, this Court ruled that they had *not* violated the Hobbs Act. The Court reasoned that there was no "obtaining of property of another" through "wrongful" means (18 U.S.C. § 1951(b)(2)) – part of the definition of "extortion" – because the defendants had acted to further "legitimate union objectives, such as higher wages in return for genuine services." 410 U.S. at 400.

If the Seventh Circuit is correct, however, then the conduct in *Enmons* violated the Hobbs Act after all. If the "physical violence" clause of the Hobbs Act is freestanding, and need not have any connection to extortion or robbery, then it would not include "wrongful" "obtaining" as an element and the Hobbs Act would apply with full force to acts or threats of violence occurring during labor protests. Nor can there be any doubt that the acts of physical violence that were proven in *Enmons* "in

[11] The panel mistakenly suggested that the rule of lenity applies only if one of the two interpretations threatened to federalize traditional state crimes. 04-1244 Pet. App. 12a (incorrectly stating that our "rule of lenity * * * argument is premised on the doomsday scenario they foresee if the Act is read to permit three independent predicate acts"). In fact, the rule of lenity requires the narrower of two reasonable interpretations, even if neither reading threatens to federalize traditional state crimes. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 148-49 (1994). And, of course, the panel's reading *does* threaten to federalize traditional state crimes. See pages 30-31, *infra*.

any way or degree * * * affect[ed] commerce" (18 U.S.C. § 1951(a)). Yet this Court noted that in 30 years no reported case had upheld the use of the Hobbs Act against violence occurring on the picket line – even though during this period "the Nation has witnessed countless economic strikes, often unfortunately punctuated by violence." 410 U.S. at 408-10. And this Court rejected the government's "broad" reading of the Hobbs Act as punishing "[t]he worker who threw a punch on a picket line" by "20 years' imprisonment and a $10,000 fine" as contrary to the rule of lenity and "an unprecedented incursion into the criminal jurisdiction of the States." *Id.* at 410. The same is true of respondents' position in this case.

Second, as noted above, the panel's decision is inconsistent with the *reasoning* of *Scheidler II*. This Court's holding that the crime of extortion under the Hobbs Act does not include mere interference with (as opposed to obtaining) of property rights rested, in large part, on the ground that Congress intended to exclude the crime of coercion from the Hobbs Act's coverage – and interference with property rights (without any obtaining) constituted coercion under New York law. See 537 U.S. at 409 (distinction between coercion and extortion "controls these cases"). The same logic, however, dooms the argument that the Hobbs Act reaches freestanding acts or threats of violence aimed at compelling businesses, customers, or employees to refrain from exercising property or liberty rights (but not at obtaining the victim's property). The panel acknowledged both that "the New York Penal Code defined coercion to include acts or threats of violence against persons or property" and that "Congress affirmatively chose not to list 'coercion' as a separate ground for Hobbs Act liability" (04-1244 Pet. App. 10a), but it refused to accept the conclusion that flows from those propositions. The panel's only explanation for that dereliction was to observe that this Court in *Scheidler II* was "not addressing the analytically distinct question" of the existence of a violence-only crime. *Ibid.* That is true but irrelevant to whether *Scheidler II*'s *reasoning* dooms respondents' interpretation of the Hobbs Act. Nor did the panel give any explanation for why

a Congress that took pains to exclude coercion from the definition of "extortion" would have meant to punish certain acts of coercion in another part of the statute. See *Culbert*, 435 U.S. at 378 (rejecting as "inconceivable" the notion that, "at the same time Congress was so concerned about clearly defining the acts prohibited under the bill," it intended to impose a limitation nowhere mentioned in statute's text).

3. The Seventh Circuit's interpretation of the Hobbs Act cannot be reconciled with the structure of the federal criminal code. As the *amicus* brief of Alabama and other States notes, the Hobbs Act as interpreted by the lower court effectively renders superfluous a wide array of other federal criminal statutes – including the Freedom of Access to Clinic Entrances Act of 1994 ("FACE Act"), which specifically addresses actual and attempted destruction or damage of clinic property, and prescribes penalties much less severe than those available under the Hobbs Act. See 18 U.S.C. § 248; *Amicus* Br. of Alabama *et al.* (merits stage), at 10-12 (listing numerous other examples, including destroying an airplane or motor vehicle and assaulting a federal officer) ("States' *Amicus* Br."). Moreover, the Seventh Circuit's reading would work a significant expansion of RICO, which specifies various crimes that qualify as predicate acts of racketeering. See 18 U.S.C. § 1961(1). Those predicates do not include, however, crimes such as assault or destruction of an airplane or violations of the FACE Act – any of which could be easily repackaged as a Hobbs Act offense under the lower court's view. On the other hand, Congress *did* include as RICO predicates certain *inherently* violent crimes – such as state-law "murder" (18 U.S.C. § 1961(1)(A)) – which would have been wholly unnecessary if the Hobbs Act already covered acts of physical violence against people.

4. The Seventh Circuit's interpretation also could federalize all manner of traditional state offenses – such as assault and malicious destruction of property – into Hobbs Act violations punishable by 20-year sentences. Indeed, if the Seventh Circuit is correct, Congress has federalized essentially all violent crime. Courts must not be "quick to assume that Congress has meant

to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States* v. *Bass*, 404 U.S. 336, 349 (1971); see also *Cleveland*, 531 U.S. at 24.

Federalism concerns are heightened because the Hobbs Act regulates the activities of state and local government officials. See 18 U.S.C. § 1951(b)(2) (defining extortion to include the "obtaining of property from another * * * under color of official right"); *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). There is no reason to suggest that Congress intended to exempt such officials from the clause prohibiting acts or threats of violence "in furtherance of a plan or purpose" to engage in official extortion. See 18 U.S.C. § 1951(a) (broadly referring to "[w]hoever" violates proscriptions); *United States* v. *Stephenson*, 895 F.2d 867, 871-73 (2d Cir. 1990) (holding that Hobbs Act applies to federal officials). Accordingly, the third clause in the Hobbs Act applies to state and local officials and, if the Seventh Circuit is correct, freestanding acts or threats of violence against property or people is a federal felony when committed by state and local officials. As the state *amici* point out, the practical consequences of that interpretation are staggering. See States' *Amicus* Br. 1, 16-17.[12]

5. Finally, if the Seventh Circuit's interpretation were correct, RICO actions based on predicate Hobbs Act offenses could be pursued against social and labor protesters of all stripes, at least if acts (or perceived threats) of violence or property damage occur during protests. See *Enmons*, 410 U.S. at 410 (noting that "the Nation has witnessed countless economic strikes, often unfortunately punctuated by violence"). Especially in light of RICO's broad concepts of enterprise liability, allowing threats of property damage to be a RICO predicate could place at risk a wide array of political and labor protesters. See *NAACP* v.

---

[12] As the state *amici* also correctly note, the Seventh Circuit's interpretation of the Hobbs Act as a general anti-violence provision should also be rejected because it raises serious constitutional issues. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring). See States' *Amicus* Br. 17-20 & n.8 (discussing issues raised under the Commerce Clause and Domestic Violence Clause).

Claiborne Hardware Co., 458 U.S. 886, 888, 920 (1982) (noting "looseness and pliability" of liability for concerted action and conspiracy and holding, in context of boycott of white merchants, that First Amendment precludes imposition of civil liability "merely because an individual belonged to a group, some members of which committed violence").[13]

C. The Seventh Circuit's Other Grounds For Concluding That The Hobbs Act Could Be Read As A General Anti-Violence Provision Were All Mistaken

The panel cited three additional reasons for its radical break from tradition. None is valid.

1. The panel purported to find support for its interpretation of Section 1951 in one sentence in *Stirone* v. *United States*, 361 U.S. 212 (1960), observing that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress had to punish interference with interstate commerce by extortion, robbery or physical violence." *Id.* at 215. But the panel's reliance on this sentence ignores this Court's clarification, in *Schcidler II*, that the sentence in question did *not* adopt a broad interpretation of the substantive provisions of the Hobbs Act but rather related only to the commerce element. See 537 U.S. at 408. Even before *Scheidler II*,

[13] There are at least three additional reasons to doubt that Congress intended the Hobbs Act to be used in conjunction with RICO against political protesters. *First*, as the legislative history of RICO makes clear, an early version of the statute was narrowed in response to concerns expressed by the Justice Department and ACLU that it was too broad and might be applied to anti-war protesters. Note, *Protesters, Extortion and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 696-97 (1999). Tellingly, the early version that was rejected would have defined racketeering activity to include acts involving "the danger of violence to life, limb or property." S. 1861, 91st Cong., 1st Sess. § 2(a) (1969). *Second*, it is difficult to see why Congress in 1994 would have enacted the FACE Act if it believed that RICO, combined with the Hobbs Act, *already* reached physical damage to clinic property. And *third*, RICO's severe criminal penalties and forfeiture provisions, and its quasi-punitive provision for treble damages, make its application to political protesters singularly inappropriate. 18 U.S.C. § 1963(a); *Alexander* v. *United States*, 509 U.S. 544 (1993).

the Ninth Circuit had correctly rejected the panel's reading of this sentence in *Stirone*. *Yankowski*, 184 F.3d at 1074. Nor was there any reason for this Court in *Stirone* to comment on the third clause of Section 1951, since the case involved a prosecution for extortion.

2. The panel also purported to find support in an unpublished decision of the Fourth Circuit, *United States* v. *Milton*, 1998 WL 468812 (Aug. 4, 1998). 04-1244 Pet. App. 12a. Respondents, however, have never cited – or defended the Seventh Circuit's citation of – that unpublished opinion, which we showed at the petition stage to be inapposite. See 04-1244 Pet. 24-25 & n.10.

3. Finally, the panel suggested that limiting criminal liability under the Hobbs Act to acts or threats of physical violence "in furtherance of a plan or purpose to do anything in violation of" Section 1951 (18 U.S.C. § 1951(a)) would violate the "well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless." 04-1244 Pet. App. 14a. "Anyone who commits physical violence to a person or property in furtherance of a plan of robbery or extortion," the panel asserted, "would almost certainly be found to have attempted one of those crimes or, if others are involved, to have conspired to commit one or the other." *Ibid.* But that analysis is soundly refuted by the language of the 1946 Act (as well as the 1934 predecessor statute), both of which clearly required that acts or threats of violence be connected to either robbery or extortion. In both instances, Congress indisputably thought that the inclusion of this provision added something to the statute and was not a meaningless act.

And Congress was right. The final clause covers conduct not otherwise punishable under the statute. For example, it covers situations where a defendant engages in violence against property or people in preparatory conduct that is not punishable as an attempt. Under New York law (which served as a model for both the Hobbs Act and the 1934 Anti-Racketeering Act, see *Scheidler II*, 537 U.S. at 403-07 & nn.10 & 11), the require-

ments for the crime of attempt were stringent. In the leading case, *People* v. *Rizzo*, 158 N.E. 888 (N.Y. 1927), the court held that an attempt to commit robbery had not occurred when armed criminals drove around the city looking to rob a specific person, but could not find him. "[M]any acts in the way of preparation are too remote to constitute the crime of attempt," the court explained; "the law considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference." *Id.* at 889. Because the defendants did not come "dangerously near" to taking the victim's property, the convictions for attempted robbery were reversed. *Ibid.*[14]

Under New York's definition of the crime of attempt, preparatory conduct that includes acts or threats of violence against people or property frequently will not be enough to establish liability. Take the example of someone who wants to rob a factory who, several weeks before the planned robbery, violently breaks open the lock on the gate to the factory parking lot in the middle of night so that he can get a closer look at surveillance cameras and other security features outside of the building. Another example of a threat not rising to the level of an attempt would be "calling a bank guard the day before [a] planned robbery and saying, 'If you interfere with me when I rob the bank, I'll kill you,' but then taking no further steps to rob the bank." Bradley, *NOW v. Scheidler: RICO Meets The First Amendment*, 1994 SUP. CT. REV. 129, 143 n.77 (1994); see also *ibid.* (noting that it "is possible to imagine a case in which one threatens violence in furtherance of a personal plan to rob a bank (or commit extortion) without conspiring or attempting to rob a bank").[15]

[14] It was not until 1962 that the Model Penal Code ("MPC") ushered in a broader definition of the crime of attempt requiring only a "substantial step" toward the commission of the crime. See Batey, *Minority Report and the Law of Attempt*, 1 OHIO ST. J. CRIM. L. 689, 694-97 (Spring 2004) (discussing MPC § 5.01). New York, however, continues to follow the so-called "*Rizzo* rule." See *People* v. *Mahboubian*, 74 N.Y.2d 174, 191 (N.Y. 1989); *People* v. *Di Stefano*, 38 N.Y.2d 640, 652 (1976).

The third clause also covers other situations not included within the other provisions of the Hobbs Act. It covers situations where the crime of attempt already has been completed, and the defendant uses acts or threats of violence either in retaliation for the victim's refusal to hand over the property or against other people (such as bystanders or the police) in an effort to avoid arrest or detection.[16] And it covers situations where a subordinate "enforcer" carries out a superior's order to threaten or damage property without knowing why he is doing so (thus making it difficult for the "enforcer" to be charged with conspiracy).[17] See *United States* v. *DiGregorio*, 605 F.2d 1184,

[15] Oddly, in the very same article Professor Bradley also states that our reading of the Hobbs Act "makes no sense" and would "render[] the third clause nugatory." Bradley, 1994 SUP. CT. REV. at 142-43. The Seventh Circuit quoted and relied heavily on those statements (04-1244 Pet. App. 13a) without recognizing that they were elsewhere refuted in the same article. In any event, Professor Bradley's argument that Congress in 1946 intended to punish freestanding acts of violence is severely flawed. Among other defects, the article (1) fails to analyze the language of the Hobbs Act as enacted, which refutes the "freestanding" reading as well as the article's principal thesis about Congress's intent in 1946; (2) mistakenly relies on a passage from a 1945 House Report that referred to a *different* title from what would become the Hobbs Act in a larger, omnibus bill – a title never enacted (because the war ended and Congress was no longer interested in wartime saboteurs); and (3) addresses none of the many counterarguments set forth in this brief.

[16] The third clause covers a broader range of people and property ("any person or property") than does the robbery offense (covering only certain property owned by or in the possession or custody of the victim, or owned by "a relative or member of [the victim's] family," or owned by "anyone in the victim's company"; and covering violence against only those individuals). See 18 U.S.C. § 1951(a), (b)(1).

[17] In the most famous line from the most famous movie about racketeering – *The Godfather* – crime boss Michael Corleone tries to extort casino owner Moe Greene to sell a casino to the "Family." Greene refuses to sell. Corleone explains, "I'll make him an offer he can't refuse." After threats fail to persuade Green to sell, Corleone sends a gunman to shoot Greene in the face. THE GODFATHER (Paramount Pictures 1972) (transcript available at

1192 (1st Cir.), cert. denied, 444 U.S. 937 (1979) ("defendants succeeded in 'commit(ting) or threaten(ing) physical violence * * * in furtherance of a plan or purpose to' violate the act by extortion that affects commerce" where one defendant was hired as an enforcer to threaten, then beat, and then shoot the victim, and other defendants made threats to the victim).

Finally, even when there is overlap between other provisions of the Hobbs Act, the third clause serves a legitimate purpose by allowing prosecutors to bring multiple charges. See *Callanan* v. *United States*, 364 U.S. 587 (1961) (upholding convictions for both conspiracy to extort and extortion under the Hobbs Act); *United States* v. *Wilson*, 997 F.2d 208 (6th Cir. 1993) (defendant pleaded guilty to conspiracy to commit robbery *and* threat of violence in furtherance of that plan).

Taking a page from Professor Bradley's article, the panel brushed aside these arguments, reasoning that any subordinate enforcer would necessarily be covered by a conspiracy charge and observing: "It seems unlikely that Congress included the 'violence' language to capture such a tiny set of academic hypotheticals." 04-1244 Pet. App. 14a. There are at least two problems with that observation, however. First, even a "tiny" set of cases would be enough to defeat the surplusage argument. And second, had the panel looked, it would have found ample evidence in the congressional debates over both the Hobbs Act and the 1934 Anti-Racketeering Act of Congress's concern about violence inflicted by subordinate "enforcers" and by those whose attempts at robbery and extortion were not successful.[18]

<http://www.jgeoff.com/godfather/gf1/transcript/gf1transcript.html>). The gunman is an enforcer. The violence that he inflicts on Moe Greene would be covered by the "in furtherance of" clause in § 1951(a) even if – as is likely the case – the crime boss did not take the time to explain the reason that he wanted his low-level henchman to inflict physical violence on the victim.

[18] See, *e.g.*, 91 CONG. REC. 11,903 (1945) ("The consequences of your refusal were * * * [s]ometimes you would be beaten up and your truck overturned."); 91 CONG. REC. 11,905 (1945) (expressing concern about "actual physical assaults of a serious character" after failed extortion attempts); 91 CONG. REC. 11,908 (1945) ("Truck drivers have been beaten up and sent to the hospitals. Some of them have been killed by these labor 'goons' and racketeers"); 89 CONG. REC. 3214 (1943) (Cong. Hobbs) ("farmers * * * fought off four goons"); 78 CONG. REC. 451 (1934) (recounting various retaliatory acts for resisting extortion schemes).

III. RICO DOES NOT AUTHORIZE PRIVATE PLAINTIFFS TO SEEK INJUNCTIVE RELIEF

RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (codified at 18 U.S.C. §§ 1961-1968). In addition to its criminal proscriptions, RICO includes a civil remedies provision, 18 U.S.C. § 1964, which authorizes the Attorney General (*id.* § 1964(b)) to initiate civil proceedings to remedy RICO violations. Section 1964(c) also authorizes any "person" who is "injured in his business or property" to bring suit and recover "threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c).[19]

In its prior decision issued in 2001, the Seventh Circuit became the first appellate court to hold that private injunctions are available. See 04-1244 Pet. App. 35a-43a. The lower court's reasons for breaking with 30 years of precedent, however, do not withstand analysis.

A. The Language And Structure Of 18 U.S.C. § 1964 Demonstrate That Private Plaintiffs Are Not Entitled To Injunctive Relief

1. Section 1964(c) allows private parties who are injured to bring suit for treble damages, costs, and attorneys' fees. As this Court has "repeatedly observed," "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws." *Holmes* v. *SIPC*, 503 U.S. 258, 267 (1992) (citing cases). "[E]ven a cursory comparison * * * reveals that the civil action provision of RICO was patterned after [Section 4 of] the

[19] For simplicity we use the terms "private party" and "person" interchangeably. There is, however, uncertainty about whether some governmental units are "persons" that may sue and be sued under civil RICO. See U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS: A MANUAL FOR FEDERAL PROSECUTORS 36-37 & n.39 (2000) ("*DoJ RICO Manual*").

Clayton Act," *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 150-51 (1987), which, in turn, was "borrowed from Section 7 of the Sherman Act," *Holmes*, 503 U.S. at 267.

Section 1964(c) provides, in relevant part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor * * * and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee * * *.

When RICO was adopted in 1970, Section 4 of the Clayton Act provided, in relevant part (Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15(a)) (see App., *infra*, 7a)):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

When the Clayton Act was adopted, Section 7 of the Sherman Act provided, in relevant part (Law of July 2, 1890, ch. 647, § 7, 26 Stat. 209, 210 (repealed 1955) (see App., *infra*, 6a)):

> Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor * * * and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

In *Paine Lumber Co.* v. *Neal*, 244 U.S. 459 (1917), *Minnesota* v. *Northern Securities Co.*, 194 U.S. 48 (1904), and other early cases, this Court repeatedly held that Section 7 of the Sherman Act did not allow parties other than the federal government to seek injunctive relief. Congress's intent "was to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public, or to all alike, * * * to those instituted in the name of the United States." *Northern Securities*, 194 U.S. at 71. "[A] private person cannot maintain a suit for an injunction under § 4 of the [Sherman Act]." *Paine Lumber*, 244 U.S. at 471; see also *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 593 (1921); *D.R. Wilder Mfg. Co.* v. *Corn Prods. Refining Co.*, 236 U.S. 165, 174-75 (1915); *United States* v. *Cooper Corp.*, 312 U.S. 600, 608 & n.9 (1941) (Sherman Act "envisaged two classes of actions[] – those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury").

A *different* provision of the Clayton Act – not the model for Section 1964(c) or any other provision of RICO – expressly authorizes private injunctive relief. Section 16 of the Clayton Act provides, in relevant part, "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the antitrust laws * * *." Clayton Act, ch. 323, § 16, 38 Stat. 730, 737 (1914) (codified at 15 U.S.C. § 26) (see App., *infra*, 7a-8a). "[T]he sole purpose of § 16 * * * was to extend to private parties the right to sue for injunctive relief." *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 634 n.5 (1977) (plurality); *California* v. *American Stores Co.*, 495 U.S. 271, 287 (1990).

This Court credits "Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4." *Holmes*, 503 U.S. at 268. Congress "used the same words," so "we can only assume it intended them to have the same meaning that courts had already given them." *Ibid.*; see also *Associated Gen. Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 534 (1983) ("When Congress enacted § 4 of the Clayton Act * * * it adopted the language of § 7 [of the Sherman Act] and presumably also the judicial gloss * * *.").

This Court has repeatedly relied on Congress's decision to model Section 1964(c) after these antitrust precursors in determining the meaning of RICO's civil enforcement scheme. See

Holmes, 503 U.S. at 267 (Section 1964(c) includes a proximate causation requirement because federal courts had read a similar requirement into the precursor provisions of the Sherman and Clayton Acts); *Agency Holding*, 483 U.S. at 150-56 (Clayton Act's 4-year statute of limitations applies to suits brought under Section 1964(c)); *Rotella* v. *Wood*, 528 U.S. 549, 559 (2000) (RICO's "civil enforcement scheme parallel to the Clayton Act regime" incorporates antitrust accrual precedent); *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 188-91 (1997).

The reasons to rely on the antitrust models are especially strong in this case. This case does not involve filling in an indispensable concept left out of civil RICO (such as the statute of limitations) with a principle taken from Section 4 of the Clayton Act. Instead, it involves the meaning of *statutory language* – creating a private right of action for treble damages and specifying the available remedies – that is *virtually identical* in Section 1964(c) and its antitrust predecessor provisions.

In "reject[ing] this line of analysis," the Seventh Circuit gave two utterly implausible reasons. 04-1244 Pet. App. 42a. First, the panel stated that "the mere fact that the Clayton Act spreads it remedial provisions over a number of different sections of the U.S. Code and RICO does not, adds little to our understanding of either statute." *Id.* at 42a-43a. But Congress did not carve up language in one statute and reallocate it to different places in another; one statute (the Clayton Act) has entirely *different* language – specifically authorizing private injunctive relief – that is not included *anywhere* in RICO.

Second, the court of appeals reasoned that this Court has "regularly treat[ed] the remedial sections of RICO and the Clayton Act identically, regardless of superficial differences in language." 04-1244 Pet. App. 43a (citing *Klehr* and *Holmes*). But the inclusion of the express authorization of private injunctive relief in Section 16 of the Clayton Act, contrasted with its omission from RICO, is hardly a "superficial difference[] in language." And the remedial provisions of RICO that *Klehr* and *Holmes* "treated * * * identically" are Section 1964(c) of RICO

and Section 4 of the Clayton Act. That any wording difference in *those* two provisions is "superficial" proves our point.

2. The Seventh Circuit purported to find evidence to support its reading in the remainder of Section 1964 – and in particular in Sections 1964(a) and (b). That was error.

Sections 1964(a) and (b) provide:

> (a) The district courts of the United States shall have *jurisdiction* to *prevent and restrain* violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person * * * ; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General *may institute proceedings under this section*. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

18 U.S.C. § 1964(a), (b) (emphasis added).

The notion that Congress's inclusion of subsections (a) and (b) reflects an intent to *expand* the meaning of Section 1964(c) beyond its antitrust-law precursors faces an insurmountable problem: both the Sherman Act and the Clayton Act *also* included provisions (1) granting equitable jurisdiction to the district courts to "prevent and restrain" violations and (2) authorizing the United States to "institute proceedings" under those statutes. Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4); Clayton Act, ch. 323, § 15, 38 Stat. 730, 736-37 (1914) (current version at 15 U.S.C. § 25); see App., *infra*, 6a-7a. In the Clayton Act, Congress saw fit to add a separate provision – Section 16 – which expressly grants private parties the right to seek injunctive relief. Clayton Act,

§ 16, 38 Stat. 737 (App., *infra*, 7a). RICO, by contrast, contains no such provision. Sections 1964(a) and (b) accordingly reflect no intent to authorize private injunctive relief.

Indeed, the close parallels between Sections 1964(a) and (b) on the one hand and analogous provisions in both the Sherman and Clayton Acts further confirm the inappropriateness of relying on Sections 1964(a) and (b) as a source of authority for private injunctive relief. Plainly, the same argument could have been made – and was made and rejected – in this Court's early Sherman Act cases disallowing private injunctive relief. See, *e.g.*, *Paine Lumber*, 244 U.S. at 471. When it enacted RICO, Congress was presumptively aware of this Court's well-established construction of the antitrust models for Sections 1964(a) and (b).

Even apart from this historical context, which the Seventh Circuit ignored, the language of Sections 1964(a) and (b) does not support the result below. Although Section 1964(a) provides that district courts "shall have jurisdiction to" order a variety of equitable remedies, it does not state who is entitled to invoke that jurisdiction. Section 1964(b) broadly authorizes the Attorney General to "institute proceedings" under Section 1964. According to the Seventh Circuit, the Attorney General's authority to seek permanent injunctive relief "comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a)." 04-1244 Pet. App. 38a.[20]

[20] The Attorney General's unrestricted right to "institute proceedings under this section" necessarily carries with it the right to seek all available equitable remedies that federal courts have jurisdiction to grant pursuant to Section 1964(a). Indeed, the reference to "proceedings" in Section 1964(b) is almost certainly an abbreviation for "proceedings in equity," the term used in the precursor provisions of the Sherman and Clayton Acts after which Section 1964(b) was modeled. See Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4); Clayton Act, ch. 323, § 15, 38 Stat. 730, 736-37 (1914) (current version at 15 U.S.C. § 25). The "prevent and restrain" language of Section 1964(a) similarly reveals a focus on proceedings in equity (as opposed to the "suit[s]" for "damages" authorized under Section 1964(c)). See also *Organized Crime Control: House Hearings on S. 30 Before the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 520 (1970) (statement of Rep. Steiger) (describing Section 1964(c) as "similar to the private damage remedy found in the anti-trust laws" and explaining that "those who have been wronged by organized crime should at least be given access to a *legal* remedy") (emphasis added).

The Seventh Circuit concluded "that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c)," 04-1244 Pet. App. 38a, but that analysis overlooks key evidence in the statutory text. In contrast to Section 1964(b)'s broad authorization allowing the Attorney General to "institute proceedings under this section" and therefore to invoke the injunctive relief district courts are empowered to issue in such proceedings by virtue of Section 1964(a), Section 1964(c) provides a far more circumscribed right of action. It permits any person who has been "injured in his business or property" as a consequence of "a violation of section 1962 of this chapter" to "sue *therefor*"[21] and specifies that in such a lawsuit the plaintiff "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." In contrast to Section 1964(b), Section 1964(c) can – and should – be read as an exhaustive list of the remedies available to a "person" authorized to sue for past injuries to "business or property."

Where, as here, Congress did not allow private parties to "institute proceedings under this section," but rather only to sue for treble damages and other specified relief, the inference is inescapable that Congress did not intend to allow private parties to invoke the equitable jurisdiction conferred by Section 1964(a). See also pages 46-49, *infra* (describing repeated, unsuccessful proposals to add language to Section 1964 authorizing private parties to "institute proceedings under subsection (a)").

[21] At the oral argument in *Scheidler II*, the Court raised the question whether the "term of art" "sue therefor" language in Section 1964(c) also appears in the provision of the Clayton Act that has been held not to authorize private injunctive relief. Oral Arg. Tr. 22. It does. See App., *infra*, 5a.

The legislative history of RICO further demonstrates the error of the Seventh Circuit's view that Section 1964(c) must, "by parity of reasoning" (04-1244 Pet. App. 38a), be regarded as bearing the same relationship to Section 1964(a) as does Section 1964(b). That analysis again overlooks the antitrust models on which Section 1964 was based. Both the Sherman Act and the Clayton Act combined in a single provision the predecessor language on which Sections 1964(a) and (b) were modeled. See Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4); Clayton Act, ch. 323, § 15, 38 Stat. 730, 736-37 (1914) (current version at 15 U.S.C. § 25). And both included as an entirely separate provision the model for Section 1964(c). This common origin suggests a special relationship between subsections (a) and (b) not shared by subsection (c).

Furthermore, as this Court has acknowledged, the Senate version of the bill that became RICO allowed the Attorney General to seek injunctive relief in civil cases, but did not provide any cause of action for private parties. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 486 (1985). The private treble-damages provision was later added by the House Judiciary Committee and approved by the House. *Id.* at 487-88. In the final version of RICO, the Senate provisions became Sections 1964(a), (b), and (d), *id.* at 486-87, while the House provision became Section 1964(c), *id.* at 487-88. As that history makes clear, Section 1964(c) was a limited, private remedy engrafted onto a preexisting remedial scheme. See *Kaushal* v. *State Bank of India*, 556 F. Supp. 576, 583 (N.D. Ill. 1983); see also *In re Fredeman Litigation*, 843 F.2d 821, 829 (5th Cir. 1988). As such, it necessarily bears a different relationship to Section 1964(a) than does Section 1964(b).[22]

[22] The Seventh Circuit's reliance on RICO's liberal construction clause and the "underlying purposes" of the statute (04-1244 Pet. App. 40a) was misplaced. As this Court has stated, the liberal construction clause "is not an invitation" to depart from Congress's intent as "gleaned from the statute through the normal means of interpretation." *Reves* v. *Ernst & Young*, 507 U.S. 170, 183-84 (1993); see also *Fredeman Litig.*, 843 F.2d at 830 (liberal construction clause "neither compels nor authorizes" court to "disregard convincing evidence from the legislative history that Congress believed it had not approved private injunctive remedies and balked at so doing"). Nor does RICO's "underlying purpose" trump the clear evidence in the text, structure, and legislative history of the statute that Congress did not intend to authorize private injunctive relief. In any event, Congress's purpose in enacting Section 1964(c) was both to "remedy economic injury" and to "bring to bear the pressure of 'private attorneys general' on a serious national problem." *Agency Holding*, 483 U.S. at 151. As this Court has pointed out, "the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages." *Ibid.*; accord *Rotella*, 528 U.S. at 557-58. Moreover, as the Court recently stated, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Great-West Life & Annuity Ins.* v. *Knudson*, 534 U.S. 204, 220 (2002) (quotation omitted).

3. Even read in a vacuum, Section 1964(c) would not support the Seventh Circuit's reading. In recent years, this Court has repeatedly emphasized that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001); see also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979); *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). Given that Congress explicitly granted private parties the right to seek treble damages, costs, and attorneys' fees, granting additional rights would be manifestly inappropriate. See generally *United States* v. *Philip Morris*, 396 F.3d 1190, 1200-01 (D.C. Cir. 2005), petition for cert. pending, No. 05-92.

B. Other Evidence In The Legislative History Confirms Congress's Intent Not To Allow Private Parties To Seek Injunctive Relief

This Court has looked to legislative history in interpreting RICO. *E.g.*, *Rotella*, 528 U.S. at 557; *Reves* v. *Ernst & Young*, 507 U.S. 170, 179-83 (1993); *Holmes*, 503 U.S. at 267; *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 238-39 (1989). RICO's legislative history confirms that Congress did not intend to authorize private parties to seek injunctive relief.

1. The Senate and House entertained but did not adopt proposals that would have expressly given private parties the right

to seek injunctive relief. In the Senate, S. 1623, a predecessor to RICO, included "a private civil cause of action * * * providing explicitly for injunctive relief as well as for treble damages." *Sedima S.P.R.L.*, v. *Imrex Co.*, 741 F.2d 482, 488 n.18 (2d Cir. 1984), rev'd on other grounds, 473 U.S. 479 (1985); see S. 1623, §§ 3(c), 4(a), 91st Cong., 1st Sess. (1969); 115 CONG. REC. 6995-96 (1969). So, too, did an earlier Senate bill. See S. 2049, §§ 4(c), 5(a), 90th Cong., 1st Sess. (1967); see also *Sedima*, 473 U.S. at 486-87. "The Senate Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary replaced S.1623 with S.1861," which did not provide a private civil cause of action. *Sedima*, 741 F.2d at 488 n.18. The bill as passed by the Senate, S. 30, also lacked a private civil cause of action. *Sedima*, 473 U.S. at 486-87.

Competing bills were also introduced in the House. See, *e.g.*, H.R. 19215, 91st Cong., 2d Sess. (1970); H.R. 19586, 91st Cong., 2d Sess. (1970). Like S. 1623 and S. 2049, H.R. 19215 included separate subsections authorizing private parties to recover, respectively, treble damages and injunctive relief. In contrast, H.R. 19586 included a provision authorizing only treble damages. "The language of RICO as enacted into law is identical to the language of H.R. 19586." Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies*, 53 TEMPLE L.Q. 1009, 1020 n.63 (1980) ("*Basic Concepts*").

Moreover, during the hearings of the House subcommittee to consider S. 30 and other measures, Representative Steiger proposed that the committee add to S. 30 not only a private treble-damages provision but also a separate provision authorizing private injunctive relief. *Organized Crime Control: House Hearings on S. 30 Before the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 520-21 (1970); see also 116 CONG. REC. 35,346 (1970). As reported out of the Judiciary Committee, however, the bill did not include this provision. See *Sedima*, 741 F.2d at 489 n.20 (noting that subcommittee had "rejected this language and explicitly created only the private action for treble damages which was eventually enacted as § 1964(c)").

On October 6, 1970, on the floor of the House, Representative Steiger proposed an amendment to the bill that would have added the provision quoted in the preceding paragraph (as well as other provisions, including one drawn from the Clayton Act, as amended, that would have authorized the United States to sue for actual damages). 116 CONG. REC. 35,227-28 (1970). He pointed out that he had urged the subcommittee to "add * * * the additional civil remedies now provided by law for antitrust cases," which "include treble damages actions by private citizens who have been harmed in their business or property, suits for equitable relief for private citizens threatened with such injury, and actions by the United States for actual damages to its business or property." *Id.* at 35,227. He criticized the reported bill on the ground that it "does not do the whole job. It makes the mistake of merely authorizing [treble-damage] suits * * * without granting to the courts the full extent of remedial authority contained in the comparable antitrust laws." *Ibid.* He continued, "the Judiciary Committee version * * * *fails to provide* * * * important substantive remedies included in the Clayton Act: * * * *equitable relief in suits brought by private citizens*." *Id.* at 35,228 (emphasis added).

During floor debate the next day, Representative Steiger again proposed but later withdrew his amendment to the bill. 116 CONG. REC. 35,346-47 (1970). In urging withdrawal, Representative Poff pointed out that the amendment "offer[ed] an additional civil remedy"; noted that "prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have in all the ramifications which this legislation contains"; and suggested that withdrawal would permit the new remedies to be "properly * * * considered by the Judiciary Committee when Congress reconvenes following the elections." *Id.* at 35,346. In agreeing to this course of action, Representative Steiger stated: "I would like to make it very clear that this is worthy of separate legislation when we do return in the fall or next year." *Id.* at 35,347.

2. The following year, Senators McClellan and Hruska (who introduced the bill that eventually became RICO, see

Agency Holding, 483 U.S. at 155) introduced S. 16, the Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972, which included a proposed amendment to Section 1964. See 118 CONG. REC. 29,369-70 (1972) (statement of Sen. McClellan). The bill would have added to Section 1964 a provision authorizing private injunctive relief that was virtually identical to the amendment offered by Representative Steiger. Compare *id.* at 29,368 with 116 CONG. REC. 35,346 (1970). As this Court has recognized, "the purpose of the bill was to broaden even further the remedies available under RICO" by "permit[ing] private actions for injunctive relief" and other remedies. *Agency Holding*, 483 U.S. at 155 (citing 118 CONG. REC. 29,368 (1972)). There is ample other evidence in the legislative record confirming that conclusion. See *Religious Tech. Ctr.* v. *Wollersheim*, 796 F.2d 1076, 1086 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); see also Br. for Operation Rescue, at 26-30. The Senate passed the bill unanimously, *Basic Concepts* at 1020 n.67 (citing 118 CONG. REC. 29,379 (1972)), but the House did not act on the bill. *Ibid.* RICO, therefore, was never amended.

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); see also *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93 (2001) (courts "ordinarily will not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language") (quotations omitted); *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983). In ignoring that principle, the Seventh Circuit erred.

C. Allowing Private Parties To Seek Injunctive Relief Under Section 1964(a) Would Vastly Expand The Scope Of Civil RICO

In the Seventh Circuit's view, "Congress intended the general remedies explicitly granted in § 1964(a)" – including but *not* limited to injunctions – "to be available to all plaintiffs."

04-1244 Pet. App. 39a. That conclusion would arm private litigants with far-reaching and novel equitable remedies. Without good evidence that Congress intended to bring about that extraordinary result, this Court should hesitate to approve it.

Section 1964(a) vests the district courts with broad jurisdiction to "issu[e] appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person * * *; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons." 18 U.S.C. § 1964(a).

In civil RICO actions brought by the United States, the federal courts have granted a broad range of equitable remedies to prevent racketeering activity and eliminate corruption from labor unions and other entities. See *DoJ RICO Manual*, at 283-97 (describing case law). Consistent with the language of Section 1964(a), courts have ordered the divestiture of interests held in a racketeering enterprise. *Id.* at 285-86 & n.10 (citing cases). And they have prohibited defendants, at the request of the government, from pursuing their livelihood in certain geographic areas, associating with co-defendants for commercial purposes, or participating in union activities. See, *e.g.*, *United States* v. *Carson*, 52 F.3d 1173, 1184-85 (2d Cir. 1995), cert. denied, 516 U.S. 1122 (1996). Moreover, the federal courts have at the government's request "frequently appointed officers, also referred to as monitors or trustees, to supervise the activities of the [RICO] enterprise." *DoJ RICO Manual*, at 284.

What is more, Section 1964(a) expressly authorizes the government to seek corporate *dissolution*. In *California* v. *American Stores Co.*, 495 U.S. 271 (1990), this Court held that Congress's broad authorization under Section 16 of the Clayton Act allowing private parties to "have injunctive relief" included the remedy of divestiture. At the same time, however, the Court distinguished the more drastic or "grave" remedy of corporate dissolution in the sense of an order "terminat[ing] the corporate

existence." *Id.* at 292-93; *id.* at 289 (likening dissolution to a "judgment * * * of corporate death") (internal quotations omitted). As the Court noted in *American Stores*, there are strong reasons to believe that private plaintiffs are *not* entitled to the remedy of dissolution under Section 16 of the Clayton Act. *Id.* at 290-94 (citing *Graves* v. *Cambria Steel Co.*, 298 F. 761 (N.Y. 1924) (Hand, J.)). If so, then it is difficult to fathom why Congress would have authorized such a drastic remedy for private parties in Section 1964(a) of RICO. In fact, Congress's express provision of the dissolution remedy in Section 1964(a) goes far toward confirming that private parties are not entitled to invoke the equitable jurisdiction conferred by that subsection.[23]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

THOMAS BREJCHA
DEBORAH FISCHER
CHRISTOPHER HENNING
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
1880 S. Redwood Street
Escondido, CA 92025
(760) 737-7181

ALAN UNTEREINER*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
NOAH MESSING
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

SEPTEMBER 2005

---

[23] Unlike federal prosecutors, private plaintiffs are not responsible for acting in the public interest or ultimately accountable to the electorate. See *Northern Securities*, 194 U.S. at 71 (exclusive government authority to seek permanent injunctive relief under Sherman Act ensures that this extraordinary remedy will be deployed "according to some uniform plan, operative throughout the entire country"). In the hands of private plaintiffs, the far-reaching equitable remedies available under RICO (including corporate dissolution) could have a devastating effect on individual, business, and organizational defendants.

APPENDIX

The Hobbs Act, 18 U.S.C. § 1951, as amended, provides in full:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section –
>
> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
> >
> > (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
> >
> > (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

The Hobbs Act, Pub. L. No. 486, 60 Stat. 420 (1946), as originally enacted and before the 1948 revisions, provided:

SEC. 1. As used in this title –

(a) The term 'commerce' means (1) commerce between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce within the District of Columbia or any Territory, and (3) all other commerce over which the United States has jurisdiction; and the term 'Territory' means any Territory or possession of the United States.

(b) The term 'robbery' means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

(c) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

SEC. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

SEC. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

SEC. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

SEC. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

SEC. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both.

The Federal Anti-Racketeering Act of 1934, 48 Stat. 979, ch. 569, provided in pertinent part:

§ 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce –

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages of a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in

furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

The New York Penal Law of 1909 provided in pertinent part:

§ 530. Coercing another person a misdemeanor

A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or abstain from doing, wrongfully and unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or,

2. Deprives any such person of any tool, implement or clothing or hinders him in the use thereof; or,

3. Uses or attempts the intimidation of such person by threats or force,

Is guilty of a misdemeanor.

* * * * *

§ 850. Extortion defined.

Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

* * * * *

§ 852. Punishment of extortion.

A person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force or a threat mentioned in the last two sections, is punishable by imprisonment not exceeding fifteen years.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, provides in relevant part:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee * * *.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant

from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

The Sherman Act of 1890 (Law of July 2, 1890, ch. 647, 26 Stat. 209), provided in pertinent part:

> § 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. [current version at 15 U.S.C. § 4]
>
> * * * * *
>
> § 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. [repealed 1955]

The Clayton Act of 1914 (ch. 323, 38 Stat. 730), provides in pertinent part:

> § 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [current version at 15 U.S.C. § 15(a)]
>
> * * * * *
>
> § 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. * * * [current version at 15 U.S.C. § 25]
>
> § 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and

upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue * * *. [current version at 15 U.S.C. § 26]

Supreme Court, U.S.
FILED
SEP - 2 2005
OFFICE OF THE CLERK

(15) (13)

Nos. 04-1244 & 04-1352

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER OPERATION RESCUE

THOMAS P. MONAGHAN
JOHN P. TUSKEY
LAURA B. HERNANDEZ
SHANNON D. WOODRUFF
LARRY L. CRAIN
ROBERT W. ASH
AMERICAN CENTER FOR
LAW & JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 226-2489

JAY ALAN SEKULOW
Counsel of Record
WALTER M. WEBER
PAUL J. LARKIN, JR.
STUART J. ROTH
VINCENT P. MCCARTHY
ANN-LOUISE LOHR
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

Attorneys for Petitioner Operation Rescue

QUESTIONS PRESENTED

In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court held that "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed," that therefore "the judgment that petitioners violated RICO must also be reversed," and that "[w]ithout an underlying RICO violation, the injunction issued by the district court must necessarily be vacated." *Id.* at 411. On remand, however, the Seventh Circuit held that all of the predicate acts were *not* reversed, and that an injunction under RICO might yet be sustained against petitioners on the basis of the supposedly unreversed predicate acts. The questions presented are:

1. Did the Seventh Circuit defy this Court's mandate?
2. Did the Seventh Circuit err by ruling, in conflict with the Sixth and Ninth Circuits, and in conflict with the official position of the Department of Justice, that the federal Hobbs Act, 18 U.S.C. § 1951, may plausibly be construed to prohibit, without any connection to robbery or extortion, any act or threat of "physical violence to any person or property" that "in any way or degree . . . affects commerce"?
3. Did the Seventh Circuit err by ruling, in conflict with the Ninth Circuit, and in conflict with the official position of the Department of Justice, that private civil litigants may obtain injunctive relief under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute?

PARTIES

In addition to petitioner (in No. 04-1352) Operation Rescue (OR),[1] the following parties were defendants-appellants in the Seventh Circuit and are petitioners (in No. 04-1244) here:

Joseph M. Scheidler
Pro-Life Action League, Inc.
Andrew D. Scholberg
Timothy Murphy

The National Organization for Women, Inc. (NOW), respondent in Nos. 04-1244 & 04-1352 and plaintiff-appellee below, sued on behalf of itself and its members and was certified as representative of the plaintiff "class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities." OR Pet. App. 91a n.12. In addition, there are two other named respondents (in Nos. 04-1244 & 04-1352), the Delaware Women's Health Organization, Inc. (DWHO) and the Summit Women's Health Organization, Inc. (Summit). Both DWHO and Summit sued on behalf of themselves and were certified as representatives of the plaintiff "class of all women's health centers in the United States at which abortions are performed." *Id.* These respondents, like NOW, were plaintiffs-appellees in the Seventh Circuit.

[1]Operation Rescue is not a corporation. *See* S. Ct. Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vii

DECISIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THIS COURT'S DECISION IN *SCHEIDLER II* DEFINITIVELY DISPOSED OF THIS CASE IN ITS ENTIRETY. 8

II. THE HOBBS ACT DOES NOT PROHIBIT VIOLENCE WHOLLY APART FROM ANY ROBBERY OR EXTORTION. 12

A. The Text of the Hobbs Act Precludes a "Violence Alone" Construction. 12

B. Both of the Other Circuits to Address the Question, as Well as the Department of Justice, Reject a "Violence Alone" Construction. 14

C. Federalism Concerns Preclude a "Violence Alone" Construction. 15

D. The Rule of Lenity Precludes a "Violence Alone" Construction. 16

III. RICO DOES NOT AUTHORIZE PRIVATE INJUNCTIVE RELIEF. 18

A. RICO's Statutory Text Gives the Attorney General Exclusive Authority to Seek Injunctive Relief. 19

1. The text and structure of RICO's remedial provisions preclude private injunctive relief. 19

2. The remedial provisions of RICO were borrowed directly from remedial provisions of antitrust statutes that do not authorize private injunctive relief. 22

B. RICO's Legislative History Shows Congress Repeatedly and Deliberately Declined to Authorize Private Injunctive Relief. 26

1. Congress specifically selected treble damages as the exclusive remedy for private RICO suits. 26

2. Congress repeatedly considered, but failed to adopt, a private injunctive remedy under RICO. 27

C. The Counterarguments in Favor of Private Injunctive Relief Under RICO Lack Merit. 30

1. The word "and" does not create a private injunctive remedy. 31

2. Subsection (a) of § 1964 does not create a private injunctive remedy. . . . 33

3. RICO's "liberal construction" clause and general purposes do not create a private injunctive remedy. 35

D. The United States as Amicus in *Scheidler II* Officially Opposed Construing RICO to Authorize Private Litigants to Invade the Attorney General's Exclusive Prerogative to Seek Equitable Relief. 36

IV. THIS COURT SHOULD LEAVE NO DOUBT THAT THIS CASE IS OVER. 38

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) 22, 25, 27, 28, 29

Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987) 10

Beck v. Prupis, 529 U.S. 494 (2000) 25

California v. American Stores Co., 494 U.S. 271 (1990) 24

Chambers Dev. Co. v. Browning-Ferris Indus., 590 F. Supp. 1528 (W.D. Pa. 1984) 30, 31

City of Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005) 21

Cleveland v. United States, 531 U.S. 12 (2000) 17

Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123 (D.N.J. 1989) 31

DeMent v. Abbott Capital Corp., 589 F. Supp. 1378 (N.D. Ill. 1984) 19, 33

First Nat'l Bank and Trust Co. v. Hollingsworth, 701 F. Supp. 701 (W.D. Ark. 1988) 30

Gregory v. Ashcroft, 501 U.S. 452 (1991) 15

Holmes Group Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002) 35

Holmes v. SIPC, 503 U.S. 258 (1992) 22, 29

In re Fredeman Litig., 843 F.2d 821 (5th Cir. 1988) 19, 26, 35

In re Managed Care Litigation, 298 F. Supp. 2d 1259 (S.D. Fla. 2003) 31

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) 21

Jones v. United States, 529 U.S. 848 (2000) 15

Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983) 19, 32, 33

Klehr v. A. O. Smith Harvestore Products, Inc., 521 U.S. 179 (1997) 25

Leocal v. Ashcroft, 125 S. Ct. 377 (2004) 17

McCormick v. United States, 500 U.S. 257 (1991) 17

McNally v. United States, 483 U.S. 350 (1987) 17

Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) 21

Minnesota v. Northern Sec. Co., 194 U.S. 48 (1904) 23, 33, 34

Motorola Credit Corp. v. Uzan, 202 F. Supp. 2d 239 (S.D.N.Y. 2002), *remanded* 322 F.3d 130 (2d Cir. 2003) (per curiam) 31

National Organization for Women, Inc. v. Scheidler, 765 F. Supp. 973 (N.D. Ill. 1991) 1

National Organization for Women, Inc. v. Scheidler, 968 F.2d 612 (7th Cir. 1992) 1

National Organization for Women, Inc. v. Scheidler, 508 U.S. 971 (1993) 1

National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 1, 2

National Organization for Women, Inc. v. Scheidler, 897 F. Supp. 1047 (N.D. Ill. 1995) 1, 3, 30

National Organization for Women, Inc. v. Scheidler, 172 F.R.D. 351 (N.D. Ill. 1997) 1

National Organization for Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) . . . . . 1, *passim*

National Organization for Women, Inc. v. Scheidler, 91 Fed. Appx. 510, 2004 U.S. App. LEXIS 4020 (7th Cir. Feb. 26, 2004) 1, 4. 5, 9

National Organization for Women, Inc. v. Scheidler,
396 F.3d 807 (7th Cir. 2005) ..... 1, *passim*

Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453 (1974) 21

New York v. United States, 505 U.S. 144 (1992) 15

P.R.F., Inc. v. Philips Credit Corp.,
No. CIV 92-2266CCC, 1992 WL 385170
(D.P.R. Dec. 21, 1992) 30

Paine Lumber Co. v. Neal, 244 U.S. 459 (1917) 23, 33

Raygor v. Regents of the Univ. of Minn.,
534 U.S. 533 (2002) 15

Religious Technology Center v. Wollersheim,
796 F.2d 1076 (9th Cir. 1986), *cert. denied*,
479 U.S. 1103 (1987) 19, 27, 30, 33

Reves v. Ernst & Young, 507 U.S. 170 (1993) 29, 35

Rotella v. Wood, 528 U.S. 549 (2000) 25

Russello v. United States, 464 U.S. 16 (1983) 20, 21, 29

Scheidler v. National Organization for Women, Inc.,
535 U.S. 1016 (2002) 1

Scheidler v. National Organization for Women, Inc.,
537 U.S. 393 (2003) ..... i, *passim*

Sedima, S.P.R.L. v. Imrex, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985) 19, 29, 32, 33

Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 22, 25, 26, 27

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1990) 34

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) ... 34

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 21

United States v. Bass, 404 U.S. 336 (1971) 15

United States v. Enmons, 410 U.S. 396 (1973) 16, 17

United States v. Franks, 511 F.2d 25 (6th Cir. 1975) ... 14, 15

United States v. Kozminski, 487 U.S. 931 (1988) 17

United States v. Staszcuk, 517 F.2d 53 (7th Cir.), *cert. denied*, 423 U.S. 837 (1975) 16

United States v. Yankowski, 184 F.3d 1071 (9th Cir. 1999) 15

University of Texas v. Camenisch, 451 U.S. 390 (1981) ... 10

Vietnam Veterans of America, Inc. v. Guerdon Indus., Inc., 644 F. Supp. 951 (D. Del. 1986) 31

STATUTES, RULES, & LEGISLATIVE MATERIALS

15 U.S.C. § 15 ..... 22, 24, 33

15 U.S.C. § 26 ..... 24, 33

18 U.S.C. § 1951 ..... i, *passim*

18 U.S.C. § 1962 2

18 U.S.C. § 1964 ..... i, *passim*

28 U.S.C. § 1254 1

28 U.S.C. § 1331 2

S. Ct. Rule 29.6 ii

115 Cong. Rec. 6,992-96 (1969) 27

116 Cong. Rec. 27,738-39 (1970) 27

116 Cong. Rec. 35,227-28 (1970) 28

116 Cong. Rec. 35,346-47 (1970) 28

117 Cong. Rec. 46,386, 46,393 (1971) 29

118 Cong. Rec. 29,368, 29,370 (1972) 29

119 Cong. Rec. 10,317-19 (1973) 29

H.R. 19215, 91st Cong., 2d Sess. (1970) 27

H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007 28

U.S. Dep't of Justice Criminal Resource Manual 2402 (available at www.usdoj.gov/usao/eousa/foia_ reading_room/usam/title9/crm02402/htm) 15

Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and procedures of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1970-71) 29

DECISIONS BELOW

Except where noted, all pertinent decisions in this case to date are entitled *National Organization for Women, Inc. v. Scheidler*. The district court's original dismissal of the case appears at 765 F. Supp. 973 (N.D. Ill. 1991), and the Seventh Circuit's affirmance at 968 F.2d 612 (7th Cir. 1992). This Court's partial grant of certiorari appears at 508 U.S. 971 (1993), and subsequent reversal at 510 U.S. 249 (1994). On remand, the district court's partial dismissal of the case appears at 897 F. Supp. 1047 (N.D. Ill. 1995), and the district court's certification of plaintiff classes appears at 172 F.R.D. 351 (N.D. Ill. 1997). The Seventh Circuit's decision affirming judgment for respondents appears at 267 F.3d 687 (7th Cir. 2001). This Court's partial grant of certiorari appears *sub nom. Scheidler v. National Organization for Women, Inc.*, 535 U.S. 1016 (2002), and this Court's subsequent reversal appears *sub nom. Scheidler v. NOW*, 537 U.S. 393 (2003). The Seventh Circuit's initial order on remand is unpublished but is available at 91 Fed. Appx. 510, 2004 U.S. App. LEXIS 4020 (7th Cir. Feb. 26, 2004). The Seventh Circuit's opinion upon the denial of rehearing appears at 396 F.3d 807 (7th Cir. 2005).

JURISDICTION

The U.S. Court of Appeals for the Seventh Circuit rendered its panel decision on remand on Feb. 26, 2004, and denied timely petitions for rehearing and rehearing en banc on Jan. 28, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS

The Appendix to the Petition for Certiorari contains the text

of the Hobbs Act, 18 U.S.C. § 1951 (OR Pet. App.[2] 139a), and excerpts of the federal Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1964 (OR Pet. App. 140a-41a).

STATEMENT OF THE CASE

This is a civil RICO case, filed in 1986, in which the district court's jurisdiction was invoked, *inter alia*, under 28 U.S.C. § 1331 and 18 U.S.C. § 1964.

Respondents -- plaintiffs below -- are the National Organization for Women, Inc. (NOW), the Delaware Women's Health Organization (DWHO), the Summit Women's Health Organization (Summit), and the classes they were certified to represent. (The plaintiffs changed over the course of the litigation. For convenience, this brief refers collectively to "NOW.") The defendants, including petitioner Operation Rescue (OR), are pro-life activist individuals and organizations.

This nearly twenty-year-old case has a lengthy history, most of which is immaterial to the questions presented here. *See* OR Pet. App. 33a-35a (this Court's recounting of history of litigation as of 2003). For present purposes, it suffices to note the following.

After considerable pretrial proceedings, including a trip to this Court, *see NOW v. Scheidler*, 510 U.S. 249 (1994) (*Scheidler I*), NOW went to trial solely on its federal RICO claim under 18 U.S.C. §§ 1962(c) and (d).

NOW's theory of the case was that any physical obstruction of abortion -- e.g., by a sit-in -- was extortion and thus a predicate act of racketeering under RICO. *See, e.g.*, Tr.[3] 4327;

---

[2]Unless otherwise noted, "OR Pet." refers throughout this brief to the petition for certiorari of Operation Rescue (OR) in No. 04-1352.

[3]"Tr." refers to the transcript of the jury trial.

id. at 5003-09.[4] The district court had previously adopted this view of extortion. *E.g.*, *NOW v. Scheidler*, 897 F. Supp. 1047, 1072-74 (N.D. Ill. 1995).

In closing arguments, NOW argued for a jury finding of "no less than 30 blockades [i.e., sit-ins]," Tr. 5005, arguing that each sit-in was an act of predicate extortion, *id.* The jury apparently found 25 sit-ins total.[5] OR Pet. App. 143a-44a. NOW also argued for at least five *threats* of physical violence, Tr. 5013-16, and seven *acts* of physical violence, Tr. 5022-23, but the jury found only four acts *or* threats total. OR Pet. App. 143a.

The jury rendered a verdict in favor of NOW and awarded damages. OR Pet. App. 142a. The district court trebled those damages pursuant to RICO. *See id.* at 98a. Moreover, the district court, which had previously rejected petitioner's contention that RICO does not authorize private parties to sue for injunctive relief, *NOW v. Scheidler*, 897 F. Supp. 1047, 1081-83 (N.D. Ill. 1995), then issued a nationwide injunction,

---

[4]*E.g.*, Tr. 5003 (closing argument of plaintiffs) ("if the defendants prevented women from getting any of those services [provided by abortion businesses], then those interferences are RICO violations"); *id.* at 5005 ("Each and every one of those blockades that shut the clinics down for any period of time was an illegal act of extortion under RICO").

[5]The jury was instructed to treat each intentional sit-in at an abortion business as both *actual* and *attempted* extortion. *See* Tr. 4945-48. Accordingly, the jury found the same number of "acts or threats" as it did "attempts" in each category (25 each for "extortion," 23 each for Travel Act violations). OR Pet. App. 143a-44a. Furthermore, the instructions for state and federal extortion were virtually identical, Tr. 4944-47, with the difference that the federal version had an interstate commerce element. Tr. 4945. Accordingly, the jury found a virtually identical number of violations in the state and federal categories, with only slightly fewer in the federal categories (presumably for lack of the interstate element). OR Pet. App. 143a-44a. Thus, a single sit-in would count simultaneously in Verdict Form boxes 4(a), (b), (d), (f), and (g), except that 4(a), (f), and (g) also had interstate travel or commerce elements. *Id.*

OR Pet. App. 82a-96a, and entered judgment for NOW, *id.* at 97a-102a.

The Seventh Circuit affirmed in all respects. *Id.* at 103a.

The defendants filed two separate petitions for certiorari. This Court granted review limited to two questions: (1) whether RICO, 18 U.S.C. § 1964(c), authorizes private injunctive relief; and, (2) whether the Hobbs Act criminalizes sit-ins and obstructive demonstrations by political protesters. OR Pet. App. 32a, 138a.

After full briefing and oral argument, this Court reversed. *Scheidler v. NOW*, 537 U.S. 393 (2003) (*Scheidler II*) (OR Pet. App. 32a-55a). The Court held that there was no Hobbs Act violation here because the conduct at issue did not qualify as "extortion." OR Pet. App. 35a-46a. For the same reason, the Court held that the other RICO predicates, namely extortion under state law and under the federal Travel Act, were likewise meritless. *Id.* at 46a-48a. Accordingly, having eliminated all of the RICO predicates, and thus the RICO judgment, this Court held that the RICO injunction "must necessarily be vacated," *id.* at 48a. The Court said it "therefore need not address" the now-moot question whether RICO authorizes private injunctive relief. *Id.*

NOW did not seek rehearing in this Court.

On remand, the Seventh Circuit did *not* simply remand with instructions to enter judgment for defendants. Instead, the court below opined that this Court had overlooked four predicate acts, and that those predicate acts might yet support the nationwide injunction the district court had issued. *Id.* at 30a-31a. The court below did not explain how it could reconcile that ruling with this Court's holding that "all of the predicate acts . . . must be reversed," that "the judgment that petitioners violated RICO must also be reversed," and that "the injunction must necessarily be vacated."

The Seventh Circuit relied for its holding upon the jury's finding (*id.* at 143a) of four unspecified "[a]cts or threats of physical violence to any person or property." (It is undisputed that this finding refers to the Hobbs Act's making it a crime to commit or threaten "physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section," *id.* at 139a.[6]) According to the Seventh Circuit, the question remained whether the Hobbs Act, 18 U.S.C. § 1951, outlaws "'physical violence' apart from extortion and robbery," OR Pet. App. 29a. The court opined that stand-alone violence possibly "constitutes an independent ground for violating the Hobbs Act," *id.* at 31a, and that the district court should therefore determine if "the four acts or threats of physical violence found by the jury" might "support the nationwide injunction," *id.*

Defendants petitioned for rehearing and rehearing en banc. The Seventh Circuit denied both, the latter over three dissenting votes. *Id.* at 1a n.*. In an opinion accompanying the denial of rehearing, the panel adhered to its view that there were "four more predicate acts" that this Court "made no ruling on," *id.* at 6a, and that an injunction under RICO remains possible "based on the record that has already been built," *id.* at. 8a.

The Seventh Circuit spent considerable effort (*id.* at 8a-16a) defending the "possibil[ity]" (*id.* at 8a) of reading the Hobbs Act to prohibit any act or threat of "physical violence to any person or property" which "in any way or degree . . . affects

---

[6]NOW has pointed out, Opp. at 4, that the Jury Verdict Form (JVF) did not explicitly link the violent acts or threats to extortion. But neither did the JVF link the "violence" predicates to the Hobbs Act (as opposed to state law). *See* OR Pet. App. 143a (JVF #4(e)). Yet NOW concedes the latter link. *E.g.*, Opp. at 4. Obviously, the JVF label was meant to be shorthand. *See* OR Pet. at 5. No significance can be read into the JVF label's omission of the full text of the Hobbs Act.

commerce," without any connection to robbery or extortion. The court below nevertheless insisted it had not actually decided the question whether stand-alone violence violates the Hobbs Act, *id.* at 7a, declaring instead that "at the tail end of litigation that has been running for almost twenty years, we prefer a wait-and-see approach," *id.* at 16a.

The Seventh Circuit did back away somewhat from its earlier ruling, however. It now declined to endorse a nationwide injunction, suggesting such would be an "abuse of discretion," *id.* at 16a, and that only some narrower injunction would be permissible, *id.* at 17a. Importantly, the court below also declared that it was "too late" for NOW to seek any damages, and that the record could not be reopened for further development. *Id.* at 7a-8a, 16a-17a.

Judge Manion, joined by Judge Kanne, wrote a dissenting opinion. *Id.* at 17a-25a. In that dissent, Judge Manion concluded that the panel's "order directly conflicts with the Supreme Court's opinion[,] . . . rests on an impermissible reading of the Hobbs Act, and unnecessarily revives a case that is already more than eighteen years old." *Id.* at 20a.

SUMMARY OF ARGUMENT

The Seventh Circuit made three errors in the latest round of this nearly twenty-year-old RICO case. Each of the lower court's three errors independently justifies reversal and remand with instructions to enter judgment for petitioners on all claims.

First, the Seventh Circuit defied this Court's mandate. This Court had expressly held that *all* of the RICO predicate acts must be reversed, that the judgment for petitioners must be reversed, and that the permanent injunction must be vacated. The Seventh Circuit erroneously held that this Court had overlooked four predicate acts which might yet support a RICO judgment and an injunction for respondents. The Seventh Circuit identified no

other basis for prolonging this case, and in fact expressly forbade any reopening of the record. Hence, the lower court's noncompliance with the mandate warrants reversal -- again -- with instructions to direct the entry of judgment for petitioners.

Second, the Seventh Circuit held that it was "not beyond the realm of possibility" (OR Pet. App. 15a) that acts or threats of violence to persons or property could qualify as Hobbs Act violations (and thus as RICO predicates) even where (as here) those acts were wholly unconnected to any robbery or extortion. The unprecedented notion that the Hobbs Act prohibits all violence that "affects commerce" cannot be squared with the text of the Hobbs Act, with the rule requiring clear statements from Congress to support such vast incursions of federal law into state criminal provinces, or with the rule of lenity. Given the Seventh Circuit's identification of no other basis for protracting this litigation, and given the Seventh Circuit's express foreclosure of any retrial or further development of the record, rejection of this wholly meritless "violence alone" theory also requires reversal and remand with directions to enter judgment for petitioners.

Third, the sole remedy open to respondents under the decision below -- injunctive relief -- is legally precluded. As the United States argued in its amicus brief in this Court in *Scheidler II*, RICO does not authorize private injunctive relief. *See* Br. for the United States as Amicus Curiae, § I, *Scheidler II* (available at www.usdoj.gov/osg/briefs/2002/3mer/1ami/2001-1118.mer.ami.pdf). The text and history of RICO's civil remedies provision clearly demonstrate that private parties are *not* entitled to sue for injunctive relief under RICO. The remedies section -- 18 U.S.C. § 1964 -- confers unqualified authority on the federal government to "institute proceedings" under RICO, but gives private litigants only a right to sue for treble damages. RICO's treble damages provision is borrowed from indistinguishable language in the federal Sherman and Clayton antitrust statutes,

language which this Court had already held does *not* authorize private injunctive relief. While Congress adopted a separate provision in the Clayton Act conferring injunctive remedies on private litigants, Congress adopted no such provision for RICO. On the contrary, the statutory history of RICO shows the repeated failure of efforts to add precisely such a private injunctive remedy.. Hence, the injunction in this case -- which rests exclusively on RICO -- must be reversed. Since no other relief sought by respondents remains an available option (the Seventh Circuit expressly foreclosed any further pursuit of damages, *infra* § IV), the legal unavailability of a private RICO injunction also requires judgment for petitioners.

This gargantuan, meritless case has wasted nearly two decades of the federal judiciary's time and resources, not to mention those of the parties and their counsel. It is well past time for an end.

ARGUMENT

There are three major flaws in the decision below, each of which independently provides a sufficient ground for reversal and remand with instructions to direct the district court to enter final judgment for petitioners.

I. THIS COURT'S DECISION IN *SCHEIDLER II* DEFINITIVELY DISPOSED OF THIS CASE IN ITS ENTIRETY.

This Court held in this case as follows:

> Because *all* of the predicate acts supporting the jury's finding of a RICO violation *must* be reversed, the judgment that petitioners violated RICO *must* also be reversed. Without an underlying RICO violation, the injunction issued by the District Court *must* necessarily be vacated.

Scheidler v. NOW, 537 U.S. at 411 (OR Pet. App. 48a) (emphasis added).

Despite this clear decree, the Seventh Circuit on remand directed the district court to decide, in the first instance, whether there are remaining predicate acts that "might independently support the injunction," OR Pet. App. 29a, or some narrower injunction, *id.* at 16a-17a. This is direct defiance of this Court's ruling. The Seventh Circuit's suggestion that the permanent injunction could reissue on the basis of some of the predicates the jury found after trial back in 1998 conflicts both with this Court's express holding that "*all* of the predicate acts" supporting a RICO violation *and* the "judgment" "must be reversed," and with this Court's express direction that the injunction "must necessarily be vacated." OR Pet. App. 48a (emphasis added). *See also id.* at 33a ("We . . . hold that our determination with respect to extortion under the Hobbs Act renders insufficient the other bases or predicate acts of racketeering . . .").

The Seventh Circuit's ruling that the possibility of an injunction under RICO remains a live issue in this case also conflicts with this Court's holding that it need not reach the propriety of private civil injunctions under RICO *precisely because no such injunction was sustainable here*. OR Pet. App. 33a, 48a. This Court had originally granted certiorari to decide two questions. *See id.* at 32a. One question was whether private injunctive relief is available under RICO. *Id.* This Court did not answer that question only because its holding on the other question -- the merits of NOW's federal extortion predicates -- precluded *any* basis for such an injunction in the first place, *id.* at 33a, 48a. Thus, the injunction issue became moot because, regardless of whether RICO authorized such relief in the abstract, there was no RICO judgment left that could serve as a basis for an injunction *in this case*. *Id.* The Seventh Circuit's

ruling that an injunction may nevertheless issue based on the prior jury verdict is irreconcilable with this Court's holding that the injunction issue no longer remains in the case.

Finally, the Seventh Circuit's remand order suffers an additional fatal flaw: it ignores the fact that the judgment -- the basis for the permanent injunction -- "must be reversed." OR Pet. App. 48a. As this Court unequivocally stated, "We further hold that our determination with respect to extortion under the Hobbs Act renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Id.* at 33a. A permanent injunction can only issue when a party finally prevails on the merits and a final judgment is entered. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 392 (1981)). Here, NOW has lost on all claims, and there is no final judgment in its favor. Even if NOW were to prevail in this Court, NOW would need to pursue a *retrial* limited to their theory of predicate Hobbs Act "violence." A retrial order, of course, is not a final victory on the merits, and thus it cannot support a permanent injunction. But more importantly, even the retrial option is no longer open to NOW: the Seventh Circuit in this case directed that there be *no* retrial, OR Pet. App. 7a-8a, 16a-17a, and NOW has not cross-petitioned from that ruling.

The jury's verdict of liability under RICO rested on a series of separate findings. *See* Jury Verdict Form (JVF) (OR Pet. App. 142a). Even if NOW were correct that this Court did not overturn 100% of the predicates, NOW concedes that at least more than 96% of the predicates (117 of 121,[7] according to

---

[7]The "121" figure exaggerates the number of predicates, as it reflects quintuple counting. *Supra* note 5. NOW has conceded this. Brief of Respondents (Nos. 01-1118 & 01-1119) at 3 & n.4, 35 & n.45.

NOW) were reversed.[8] Thus, it is impossible to conclude that the four supposedly remaining predicates would necessarily have sufficed to sustain the other essential jury findings, for example, of a RICO "pattern" (JVF #7), an effect on interstate commerce (JVF #8), or proximate causation of injury to the plaintiffs (JVF #9). *See also Scheidler II*, 537 U.S. at 401 n.5 (OR Pet. App. 37a n.5) (even a single faulty theory of RICO liability in the jury instructions would preclude affirmance of the judgment); OR Pet. App. 23a (dissent from denial of rehearing) (noting that current record cannot support "affecting commerce" element of Hobbs Act).

In short, even under NOW's theory of the case, the judgment must be overturned, leaving no basis for the permanent injunction. The Seventh Circuit's failure even to mention this, especially given this Court's clear directive that the verdict and judgment "must be reversed," is truly remarkable.

---

[8]Tellingly, in its merits briefing before this Court in *Scheidler II*, NOW gave every indication that the four "violence" predicates were part and parcel of its extortion theory. In its answering brief, NOW expressly referred to "121" (not 117) RICO predicates, i.e., including the four "violence" predicates. *E.g.*, 01-1118 & 01-1119 Br. of Respondents at 1, 3 & n.4. In fact, NOW highlighted the alleged violent conduct. *E.g.*, *id.* at 2 & n.3, 11-12, 29, 50. Moreover, NOW argued that "[b]ecause the Hobbs Act requires the obtaining of property," NOW had "relied *only* on wrongful acts designed to make Respondents [NOW *et al.*] cede control of their property to Petitioners, *not on crimes that entailed no demand to surrender property*." *Id.* at 9 (emphasis added). NOW further argued that "*all* of the acts that supported the jury's findings as to *Hobbs Act* violations *also* supported its findings as to *state law* violations," *id.* at 35 (emphasis added). *See also id.* at 3 n.4 ("*each* of the Hobbs Act violations were also the basis for a finding as to state *extortion* laws") (emphasis added). The only *state* law predicates NOW claimed were alleged *extortion*, OR Pet. App. 34a, 46a, 106a, 143a (JVF #4(b)). Thus, NOW conceded that its Hobbs Act predicates *all* hinged on extortion.

II. THE HOBBS ACT DOES NOT PROHIBIT VIOLENCE WHOLLY APART FROM ANY ROBBERY OR EXTORTION.

According to NOW, the Hobbs Act, 18 U.S.C. § 1951, which proscribes robbery and extortion (neither of which is present here), also prohibits acts or threats of physical violence to any person or property *independent* of any robbery or extortion. The Seventh Circuit held that this was a "possible" reading of the Hobbs Act that could be adopted "without undue strain," OR Pet. App. 8a-9a. It is not.

A. The Text of the Hobbs Act Precludes a "Violence Alone" Construction.

NOW's construction of the Hobbs Act flies in the face of the plain text of the statute. The Hobbs Act, 18 U.S.C. § 1951(a) (OR Pet. App. 139a) (emphasis added), provides as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical *violence* to any person or property *in furtherance of a plan or purpose to do anything in violation of this section* shall be fined under this title or imprisoned not more than twenty years, or both.

Plainly, any crime under the Hobbs Act relates, either expressly or by cross-reference, to robbery or extortion. By contrast, NOW's proposed construction, which would create a new offense of "violence" which "affects commerce," lacks grammatical parallelism, is awkward, and is incapable of coherent parsing.

The Seventh Circuit opined conclusorily that the "violence-in-furtherance" prong could, "without undue strain," OR Pet. App. 9a, grammatically be read not to require any link to robbery or

extortion. Neither that court, nor respondents, however, have offered an alternative parsing of the text that would support such a construction, despite petitioner OR's repeated insistence that no such parsing is available.

The Hobbs Act proscribes acts or threats of violence *only* "in furtherance of a plan or purpose to do anything in violation of this section," *id.*[9] "This section," in turn, prohibits "obstruct[ing], delay[ing], or affect[ing]" commerce or the movement of any thing in commerce "by *robbery* or *extortion*," *id.* (emphasis added).

NOW disagrees, but -- like the Seventh Circuit -- NOW steadfastly refuses to explain just what, under its view, "a violation of this section" means. To read a "violation" to mean merely "affecting commerce" would be perverse. The Hobbs Act does not proscribe merely "affecting commerce." (If it did, most business operations would violate the Hobbs Act.) To read a "violation" to mean "affecting commerce by acts or threats of violence," meanwhile, would be hopelessly circular. The Hobbs Act would, under this reading, forbid "affect[ing] commerce . . . by . . . physical violence . . . in furtherance of a plan or purpose to [affect commerce by physical violence in furtherance of a plan or purpose to affect commerce by physical violence in furtherance *etc. ad infinitum*]." That is not statutory interpretation; it is a skipping record.

NOW's faulty reading of the Hobbs Act excises the statutory text limiting the Hobbs act to robbery or extortion. Thus, NOW

---

[9]The "violence-in-furtherance" provision of the Hobbs Act covers, for example, the subordinate "enforcer" who, while not himself extorting anything, harms people or property when the extortionist does not obtain the desired payment from the victim. It also may be used to bring an additional criminal count, as where a defendant who has already committed the completed offense of extortion independently of any violence, e.g., "under color of official right," also threatens violence to person or property.

would read the Hobbs Act to make a federal crime of *any* act or threat of physical violence, to *any* person or property, whenever that act or threat "in any way or degree . . . affects commerce or the movement of any article or commodity in commerce," § 1951(a). This would convert the Hobbs Act into a breathtakingly broad general federal "anti-violence" statute, without any clear statement that Congress intended such an outcome. *See infra* § II(C).

As the amici States persuasively argue, *see* Brief of the States of Alabama *et al.* (States Br.), NOW's proposed reading of the Hobbs Act is not only grammatically implausible, *id.* § I, and irreconcilable with the statutory evolution of the Hobbs Act, *id.* § II, it is also untenable for other reasons. For one thing, reading the Hobbs Act to criminalize all violence that "affects commerce" would render superfluous numerous other federal statutes that address violence to persons or property in a more tailored manner. *Id.* § III (listing examples). For another, reading the Hobbs Act as a broad anti-violence statute would dramatically expand the scope of RICO, in conflict with the deliberate efforts of Congress to limit RICO's scope by enumerating selected predicate offenses, *id.* And as if that were not enough, construing the Hobbs Act as a general anti-violence statute would dramatically alter the federal-state balance, without any clear statement from Congress of an intent to do so. *Id.* § IV. *See infra* § II(C).

B. Both of the Other Circuits to Address the Question, as Well as the Department of Justice, Reject a "Violence Alone" Construction.

NOW's argument was squarely rejected in the Sixth and Ninth Circuits in the only cases to assess the merits of this unlikely reading of the Hobbs Act. *United States v. Franks*, 511 F.2d 25, 31 (6th Cir. 1975) ("The statute's language and

legislative history require that the violence be in furtherance of a plan or purpose to obstruct, delay, or affect commerce *by extortion or robbery*") (emphasis added; footnote omitted); *United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999) (holding violence-alone theory "untenable in light of the clear language of the Hobbs Act," *id.* at 1072).

The Department of Justice also formally disavows NOW's proposed reading of the Hobbs Act. The Department of Justice takes the position that there can be no Hobbs Act "violence" crime absent a link to extortion or robbery. *See* U.S. Dep't of Justice Criminal Resource Manual 2402 (Hobbs Act -- Generally) ("The statutory prohibition of 'physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section' is confined to violence for the purpose of committing robbery or extortion") (citing *Franks*) (available at www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02402/htm).

There is no reason for this Court to reach a contrary conclusion.

C. Federalism Concerns Preclude a "Violence Alone" Construction.

This Court is loath to interpret federal statutes in ways that "upset the usual balance of federal and state powers." *New York v. United States*, 505 U.S. 144, 170 (1992). *See generally Gregory v. Ashcroft*, 501 U.S. 452 (1991). "[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971). *Accord Jones v. United States*, 529 U.S. 848, 858 (2000); *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543-44 (2002). This rule militates against turning the Hobbs Act into a device for federalizing such traditional state offenses as

assault, battery, and destruction of private property. *See United States v. Staszcuk*, 517 F.2d 53, 55 (7th Cir.) (en banc) (per Stevens, J.) (the "extraordinary growth of federal criminal litigation poses a serious threat to the quality of federal justice; moreover, this growth may not only reflect but contribute to the continuing transfer of power from the several states to the national government. . . . [W]e have no desire to accelerate this trend unnecessarily"), *cert. denied*, 423 U.S. 837 (1975).

This Court expressed the same caution in refusing to apply the Hobbs Act to unlawful conduct incident to a labor strike:

> [It] would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

United States v. Enmons, 410 U.S. 396, 411 (1973) (citations omitted).

A construction of the Hobbs Act that would make a federal crime out of any "violence" that "affects commerce" flies directly in the face of this established norm of statutory interpretation.

D. The Rule of Lenity Precludes a "Violence Alone" Construction.

Even if the question were close and debatable (which it is not), the rule of lenity would foreclose NOW's astonishingly expansive and unprecedented misreading of the Hobbs Act.

Any "uncertainty concerning the ambit of criminal statutes

should be resolved in favor of lenity." *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (and cases cited). As a criminal law, the Hobbs Act is subject to this rule of strict construction. *United States v. Enmons*, 410 U.S. 396, 411 (1973); *McCormick v. United States*, 500 U.S. 257, 272-73 (1991); *Scheidler v. NOW*, 537 U.S. 393, 409 (2003) (OR Pet. App. 46a). Although the present case involves a civil suit, the Hobbs Act

> is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

Leocal v. Ashcroft, 125 S. Ct. 377, 384 n.8 (2004). Moreover, as a RICO predicate, the Hobbs Act is a particularly apt subject for the rule of lenity:

> [W]e have instructed that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. . . . This interpretive guide is especially appropriate in construing . . . a predicate offense under RICO . . . .

Cleveland v. United States, 531 U.S. 12, 25 (2000) (internal quotation marks and citations omitted).

"The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (citations omitted). This rule serves many important purposes: "to promote fair notice to those subject to criminal law, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts," *Kozminski*, 487 U.S. at 952.

To accept NOW's unprecedented expansion of the Hobbs Act

would be to stand the rule of lenity on its head, as this would require both *creating* ambiguity where the pertinent statutory text is clear, and then resolving that ambiguity in favor of an extremely broad interpretation. This Court must therefore reject petitioners' novel and highly strained construction of the Hobbs Act.[10]

III. RICO DOES NOT AUTHORIZE PRIVATE INJUNCTIVE RELIEF.

RICO does not authorize injunctive relief in civil suits brought by private parties. The United States reads the statute in the same manner as petitioners do, as the Solicitor General made clear in the brief that the federal government filed in this Court in *Scheidler II*. *See* Brief for United States as Amicus Curiae (U.S. Br.), Nos. 01-1118 & 01-1119 (*Scheidler II*) (*supra* p. 7) (discussed *infra* § III(D)).

In RICO, Congress employed language taken almost word-for-word from antitrust law, language which this Court had already held *not* to authorize private injunctive relief. Congress eschewed other language, in antitrust law, expressly conferring private injunctive remedies. The exclusion of private injunctive relief from civil RICO could scarcely be clearer.

The decision below is aberrant and erroneous. The virtually unanimous conclusion of the lower courts analyzing the issue -- that RICO does not authorize injunctive relief for private parties

---

[10]As the foregoing discussion demonstrates, there is no need whatsoever for recourse to the legislative history of the Hobbs Act as an interpretive tool. It nevertheless bears mention that the pertinent history unequivocably confirms that Congress never intended the Hobbs Act to prohibit violence unconnected either to robbery or to extortion. *See* Brief for Petitioners Scheidler *et al.* § II(A).

-- is clearly correct.[11]

A. RICO's Statutory Text Gives the Attorney General Exclusive Authority to Seek Injunctive Relief.

1. The text and structure of RICO's remedial provisions preclude private injunctive relief.

The remedies provision of RICO (18 U.S.C. § 1964), OR Pet. App. 140a-41a,[12] contains three subsections addressing civil relief. None gives injunctive relief to private parties.

Subsection (a) confers jurisdiction upon the district courts and

---

[11]Many lower federal courts have addressed this question. In *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the Ninth Circuit exhaustively analyzed the text and history of the remedies section of RICO, the pertinent precedents, and the competing legal arguments, *see Wollersheim*, 796 F.2d at 1080-88. The *Wollersheim* court concluded that "the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO." *Id.* at 1088 (footnote omitted). Moreover, almost no court since *Wollersheim* -- other than in this case -- has held that private parties can obtain injunctive relief under RICO. Even prior to *Wollersheim*, only one district court so held. *See infra* note 18. Every other court to address the issue (except in this case and two other district court cases, *see infra* note 18) has either rejected private equitable relief under RICO, expressed serious doubts about such relief, or declined to decide the question. *See* 01-1119 Pet. at 11-12 & nn. 16-19. (For an especially thorough analysis of the issue, *see Wollersheim*; *In re Fredeman Litig.*, 843 F.2d 821, 828-30 (5th Cir. 1988); *Sedima, S.P.R.L. v. Imrex*, 741 F.2d 482, 489 n.20 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985); *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983); *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1381-83 (N.D. Ill. 1984).)

[12]The version set forth in OR's Petition Appendix was effective at the time the present lawsuit was filed. In 1995, Congress amended subsection (c) in a way irrelevant here. The 1995 amendment does not apply to actions, like the present suit, commenced prior to December 22, 1995.

authorizes broad equitable remedies. This provision, however, does not empower private litigants to seek the injunctive relief authorized.

Subsection (b) authorizes the U.S. Attorney General to "institute proceedings under this section." This unqualified authorization to "institute proceedings" plainly authorizes the federal government to pursue the full range of remedies for which subsection (a) creates jurisdiction.

Subsection (c) then specifies that "[a]ny person injured in his business or property . . . may sue therefor . . . and shall recover threefold the damages he sustains . . . ." Unlike subsection (b), there is no blanket authorization to "institute proceedings"; instead, using distinct language, the provision specifies a right to sue and a remedy, namely, treble damages. This Court's observation in *Russello v. United States*, 464 U.S. 16 (1983), therefore applies here:

> Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Id. at 23 (internal quotation and editing marks omitted). Had Congress intended to confer on private parties an unqualified right to "institute proceedings," then -- in the words of *Russello* -- "it presumably would have done so expressly as it did in the immediate [preceding] subsection," *id.*

Subsection (b) and (c) are decidedly *not* parallel; hence, contrary to the court below, no "parity of reasoning," OR Pet. App. 111a, leads to the conclusion that private parties can claim the universe of relief authorized under subsection (a). On the contrary, as in *Russello*, this Court should

> refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would

> not presume to ascribe this difference to a simple mistake in draftsmanship.

464 U.S. at 23. Indeed, were the contrary true, private parties would be entitled to sue, not just for treble damages and injunctions, but also for all the other equitable relief available to the Attorney General, including dissolution of enterprises. *See* § 1964(a).

The statutory text of RICO therefore plainly indicates that Congress did *not* authorize private injunctive relief:

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.

Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); *accord Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-32 (1989). For example, this Court has held that a statute expressly authorizing private citizens to sue for injunctions would not be construed as implying a private right of damages. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). This rule makes perfect sense: "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15. *Accord Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it"); *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453, 1458 (2005) ("the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others") (internal editing marks and citation omitted).

2. The remedial provisions of RICO were borrowed directly from remedial provisions of antitrust statutes that do not authorize private injunctive relief.

The conclusion that private parties cannot obtain injunctive relief under RICO is confirmed beyond all doubt by reference to the antitrust model from which Congress borrowed the remedial provisions of RICO. Congress borrowed, for RICO, precisely the remedial language this Court had held *not* to authorize private injunctive relief, and *declined* to borrow a separate provision of antitrust law expressly conferring private injunctive remedies.

With RICO, Congress employed the "use of an antitrust model for the development of remedies" against crime. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987). The "clearest current in the legislative history of RICO is the reliance on the [antitrust] model." *Id.* (internal quotation marks and citation omitted). *Accord Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985). It follows that the same language held *not* to authorize injunctive relief in an antitrust statute does *not* authorize injunctive relief under RICO:

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4 (15 U.S.C. § 15). . . . It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Holmes v. SIPC, 503 U.S. 258, 268 (1992) (citations omitted).

This Court construed the statutory language in question, in the Sherman antitrust statute, *not* to authorize private injunctive

relief. *See Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904) (section 7 of antitrust statute does not authorize private suits for equitable relief).

> We cannot suppose it was intended that the enforcement of the act should depend in any degree upon original suits in equity instituted by the States or by individuals to prevent violations of its provisions.

Id. Accord Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917). The parallels to RICO are striking. Section 7 of the Sherman antitrust statute provided:

> "*Any person* who shall be *injured in his business or property* . . . by reason of anything forbidden or declared to be unlawful by this act *may sue therefor . . . and shall recover threefold the damages* by him sustained, and the costs of suit, including a reasonable attorney's fee."

194 U.S. at 68 (quoting statute) (emphasis added). The language of RICO § 1964(c) is virtually word-for-word the same:

> *Any person injured in his business or property* by reason of a violation of section 1962 of this chapter *may sue therefor* in any appropriate United States district court *and shall recover threefold the damages* he sustains and the cost of the suit, including a reasonable attorney's fee.

OR Pet. App. 140a-41a (emphasis added).

Like RICO § 1964, the Anti-Trust Act construed in *Northern Securities* contained a subsection conferring on federal courts "jurisdiction to prevent and restrain violations of this act" (Section 4), *see* 194 U.S. at 67. The existence of a similar grant of equity jurisdiction in RICO § 1964(a) (OR Pet. App. 140a) only bolsters the statutory parallel.

After *Northern Securities*, Congress in 1914 enacted the

Clayton Antitrust Act. That statute contains the following treble damages language:

> *[A]ny person* who shall be *injured in his business or property* by reason of anything forbidden in the antitrust laws *may sue therefor . . . and shall recover threefold the damages* by him sustained, and the cost of suit, including a reasonable attorney's fee . . . .

15 U.S.C. §15(a) (emphasis added). This provision is borrowed straight from Section 7 of the Sherman Act -- i.e., the provision held *not* to authorize private injunctive relief. In addition to the treble damages provision, Congress *added* a *separate* provision authorizing private parties to sue for injunctions:

> Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . .

15 U.S.C. § 26. *See California v. American Stores Co.*, 494 U.S. 271, 287 (1990) (provision "filled a gap in the Sherman Act by authorizing equitable relief in private actions"). This express conferral of private injunctive remedies has no parallel in RICO.

In sum, when enacting RICO § 1964, Congress borrowed the treble damages language of the Sherman and Clayton Acts, but did *not* borrow the private injunctive remedy language of the Clayton Act. The conclusion is inescapable: RICO does not authorize private injunctive relief.[13]

---

[13]The Seventh Circuit declared that because this Court "regularly treats the remedial sections of RICO and the Clayton Act identically," OR Pet. App. 117a, RICO should be read as authorizing private injunctive relief "regardless of superficial differences in language," *id.* To state this argument is to refute it. The *existence* of an express grant of private injunctive relief in the Clayton Act, and its *absence* in RICO, is not a "superficial" difference in language.

* * *

This Court appears already to have acknowledged that private injunctive relief is not available under RICO. This Court has consistently described RICO § 1964(c) as authorizing a "private treble-damages action," *Sedima*, 473 U.S. at 486. *Accord id.* at 481, 487-88, 490, 493; *Agency Holding Corp.*, 483 U.S. at 151-52; *Klehr v. A.O. Smith Harvestore Products, Inc.*, 521 U.S. 179, 183 (1997); *Rotella v. Wood*, 528 U.S. 549, 551 (2000); *Beck v. Prupis*, 529 U.S. 494, 496 & n.1 (2000) (describing RICO provisions for criminal penalties and civil suits, and separately noting that RICO "authorizes *the Government* to bring civil actions to 'prevent and restrain' violations") (emphasis added). The text of RICO confirms this Court's consistent understanding of civil RICO.

NOW conceded in *Scheidler II* that § 1964(c), the private remedies provision of RICO, does not authorize injunctive relief. 01-1118 & 01-1119 Opp. at 9 ("RICO's *only* source of permanent injunctions is § 1964(a)") (emphasis added). NOW therefore hangs its entire case for injunctive relief on § 1964(a). This Court has already noted, however, that § 1964(a) is part of remedial provisions "limited to injunctive actions by the United States," *Sedima*, 473 U.S. at 486-87 (1985). Despite *Sedima*, NOW argues that because § 1964(a) does not *expressly exclude* private parties, it must be read to *include* them. 01-1118 & 01-1119 Opp. at 9-10. This is illogical. Section 1964(a) does not, by its terms, authorize *any* party to bring a civil RICO action, including the federal government. The United States can sue for injunctive relief under RICO only because a separate subsection -- § 1964(b) -- gives the Attorney General authority to "institute proceedings under this section." By contrast, the private treble-damages provision, § 1964(c) -- the only subsection to authorize private relief -- contains no blanket authorization for private parties to "institute proceedings." That subsection only entitles

persons injured in their business or property to "sue therefor . . . and recover threefold the damages," § 1964(c). This subsection does not reference § 1964(a) or even "this section," but instead, as this Court has always understood, provides a distinct private damages remedy.

B. RICO's Legislative History Shows Congress Repeatedly and Deliberately Declined to Authorize Private Injunctive Relief.

The legislative history of RICO confirms, indeed compels, the conclusion already drawn from the text of RICO: private injunctive relief is not available under RICO.

1. Congress specifically selected treble damages as the exclusive remedy for private RICO suits.

RICO was enacted as Title IX of the Organized Crime Control Act of 1970. *Sedima*, 473 U.S. at 486. The Senate, which passed the legislation first, did not provide for private party suits under RICO.

> The civil remedies in the bill passed by the Senate, S 30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d).

473 U.S. at 486-87. The "private treble-damages action" was added, later, in the House of Representatives. *Id.* at 487-88. The Senate then adopted the bill as amended in the House. *Id.* at 488. As the Fifth Circuit explained, "Section 1964(c), providing the treble damage remedy, then becomes a branch grafted onto the already-completed trunk of the statute." *Fredeman*, 843 F.2d at 829 (footnote omitted).

This "grafted-on branch" very specifically authorized "a private treble-damages action," *Sedima*, 473 U.S. at 487, as a supplement to federal government enforcement of the statute,

and as a remedy for those wronged by organized crime, *id.* *See also Agency Holding Corp.*, 483 U.S. at 151 (RICO's civil enforcement provision was designed "to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees"); *id.* ("the mechanism chosen to reach the objective in . . . RICO is the carrot of treble damages"). The selection of a treble damages remedy, and *only* a treble damages remedy, was plainly a deliberate choice by Congress.

2. Congress repeatedly considered, but failed to adopt, a private injunctive remedy under RICO.

That Congress deliberately limited private civil relief to treble damages (and costs and attorney fees) appears even more clearly from the rejection by Congress of proposals to authorize private injunctive relief:

> [I]n considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.

Wollersheim, 796 F.2d at 1086 (emphasis in original).

RICO predecessor legislation in the Senate and in the House explicitly allowed for private party injunctive relief. *Id.* at 1084. *See* 115 Cong. Rec. 6,992-96 (1969) (discussing predecessor Senate bills); H.R. 19215, 91st Cong., 2d Sess. (1970) (predecessor House bill). In fact, Representative Steiger, who proposed the addition of the treble damages provision, *Sedima*, 473 U.S. at 487, made that proposal in an amendment which also included a provision for private injunctive relief. *See* 116 Cong. Rec. 27,738-39 (1970) (Steiger Amendment, proposed subsection (c), provided: "Any person may institute proceeding under subsection (a) [of § 1964] . . . [and] relief shall be granted

in conformity with the principles which govern the granting of injunctive relief . . ."). The House Committee on the Judiciary, however, adopted only the private treble damages remedy, not the private injunctive remedy. *See* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034. Rep. Steiger, while "extremely pleased . . . that the Judiciary Committee has approved . . . a provision authorizing treble damage actions by private persons," 116 Cong. Rec. 35,227 (1970), nevertheless lamented that the committee version did "not do the whole job," *id.* In particular, Rep. Steiger bemoaned the fact that "the Judiciary Committee version . . . fails to provide . . . equitable relief in suits brought by private citizens." *Id.* at 35,228.

On the floor of the House, Rep. Steiger again "offered an amendment that would have allowed private injunctive actions" under RICO, *Sedima*, 473 U.S. at 487. *See* 116 Cong. Rec. 35,228, 35,346 (1970). "The proposal was greeted with some hostility . . . and Steiger withdrew it without a vote being taken." *Sedima*, 473 U.S. at 487-88. *See* 116 Cong. Rec. 35,346-47 (1970). As this Court has explained, the reason for this hostility, for the withdrawal of the proposal, and for the reference of the proposal instead to a committee, was precisely because the proposed amendment "included yet another civil remedy," *Agency Holding Corp.*, 483 U.S. at 154, namely, private injunctive relief. *See* 116 Cong. Rec. 35,346 (1970) (statement of Rep. Poff) (Steiger amendment "does offer an additional civil remedy" and "prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have").

Congress failed to enact legislation, proposed the very next term after the enactment of RICO, which was designed "to broaden even further the remedies available under RICO. In particular, it would have . . . permitted private actions for

injunctive relief." *Agency Holding Corp.*, 483 U.S. at 155.[14]

In 1973, Congress again considered, and failed to enact, a bill to amend RICO by adding private injunctive relief. *See* 119 Cong. Rec. 10,317-19 (1973) ("Civil Remedies for Victims of Racketeering Activity and Theft Act of 1973").

In sum, Congress repeatedly declined to authorize private injunctive relief under RICO. *See Russello*, 464 U.S. at 23-24 (citing "evolution of [RICO's] statutory provisions" as aid to statutory construction, and adding, "[w]here Congress includes [certain] language in an earlier version of the bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended").[15]

---

[14]*See also Sedima*, 741 F.2d at 489 n.20; 117 Cong. Rec. 46,386 (1971) (statement of Sen. McClellan) (Title IV of "Victims of Crime Act of 1972" would "authorize private injunctive relief from racketeering activity"); *id.* at 46,393 (text of bill proposing to amend RICO to add private injunctive remedy); *Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 3 (1970-1971) (text of proposed bill providing for private injunctive relief under RICO); *id.* at 51 (same); *id.* at 158 (statement of Richard Velde, Associate Administrator, Law Enforcement Assistance Administration) (proposed legislation "would expand the available civil remedies. Section 1964 [of RICO] would be amended to permit any person to institute a civil proceeding to prevent or restrain violations . . . . Now only the United States can institute injunctive proceedings"); 118 Cong. Rec. 29,368 (1972) (text of "Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972" proposing *inter alia* to amend RICO to add private injunctive relief); *id.* at 29,370 (statement of Sen. McClellan) (bill "authorizes private injunctive relief from racketeering activity").

[15]The Seventh Circuit disparaged recourse to the legislative history of RICO. OR Pet. App. 115a-16a. But this Court has repeatedly invoked legislative history as a basis for limiting RICO. *E.g.*, *Holmes v. SIPC*, 503 U.S. 258, 267-68 (1992); *Reves v. Ernst & Young*, 507 U.S. 170, 179-83 (1993). In fact, as illustrated in the text *supra*, analysis of legislative history

(continued...)

C. The Counterarguments in Favor of Private Injunctive Relief Under RICO Lack Merit.

In light of the foregoing, it is not surprising that virtually every court to address the issue has concluded that RICO does not authorize private parties to sue for injunctive relief. *See supra* note 11. Indeed, lower courts have frequently declared themselves *compelled* to reach this conclusion.[16]

The district court[17] and court of appeals in the present case, meanwhile, offered no convincing analysis. Furthermore, none of the arguments offered for reading into RICO a private injunctive remedy has merit.[18]

---

[15](...continued)
is characteristic of this Court's RICO jurisprudence.

[16]*See, e.g.*, *Wollersheim*, 796 F.2d at 1088 ("Taken together, the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO") (footnote omitted); *First Nat'l Bank and Trust Co. v. Hollingsworth*, 701 F. Supp. 701, 703 (W.D. Ark. 1988) ("it would be difficult, if not impossible, to draw a different conclusion"); *P.R.F., Inc. v. Philips Credit Corp.*, No. CIV 92-2266CCC, 1992 WL 385170 at *3 (D.P.R. Dec. 21, 1992) ("any other conclusion would not be reasonable").

[17]The district court provided virtually no analysis of the issue. *See NOW v. Scheidler*, 897 F. Supp. 1047, 1081-83 (N.D. Ill. 1995) (order regarding motions to dismiss); OR Pet. App. 82a-84a (granting permanent injunction). That court said that there was "substantial authority" for its position among the lower courts and declared itself "persuaded by the rationale in those opinions." 897 F. Supp. at 1083. But none of the cases the district court cited held that private parties can sue for injunctive relief under RICO. Indeed, several of the decisions the district court relied upon did not even involve RICO.

[18]Out of some two dozen courts to discuss the issue, only three district courts (aside from the courts below here), have held that private parties can obtain injunctions under RICO. *See Chambers Dev. Co. v. Browning-Ferris*
(continued...)

1. The word "and" does not create a private injunctive remedy.

It has been argued that the word "and" in RICO § 1964(c) provides a justification for private injunctive relief. The contention is that, because subsection (c) provides that any person injured in his business or property may sue "*and* shall recover" treble damages, instead of providing that any such person may sue "*to* recover" treble damages, that therefore the relief under subsection (c) is not limited to treble damages.

The Seventh Circuit embraced essentially this argument in support of its holding. The court read the word "and" as

---

[18](...continued)
Indus., 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984); *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 243-44 (S.D.N.Y. 2002), *remanded*, 322 F.3d 130 (2d Cir. 2003) (per curiam) (directing dismissal of RICO claims as unripe); *In re Managed Care Litigation*, 298 F. Supp. 2d 1259, 1281-83 (S.D. Fla. 2003).

One case -- *Chambers* -- preceded the extensive analysis in *Wollersheim* and has not been followed by any other court. Indeed, even later district court decisions in the same federal circuit (the Third) as the *Chambers* court reached the opposite conclusion from *Chambers*, ruling that RICO does not provide for injunctive relief to private parties. *See Vietnam Veterans of America, Inc. v. Guerdon Indus., Inc.*, 644 F. Supp. 951, 960-61 (D. Del. 1986); *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1137-38 (D.N.J. 1989).

The second, while distancing itself from the Seventh Circuit's reasoning in this case, erroneously relied upon a presumed power of courts, *apart from RICO*, to grant equitable relief. *Motorola Credit*, 202 F. Supp. 2d at 243-44. In effect, the *Motorola* court placed the burden on Congress explicitly to *deny* private injunctive relief to private parties, rather than following the rule that where Congress specifies certain remedies, they are normally deemed exclusive. *See supra* § III(A)(1). In any event, this decision was overturned on other grounds. *See supra*.

The third district court simply followed the Seventh Circuit's decision in this case. *In re Managed Care Litigation*, 298 F. Supp. 2d at 1283.

severing the first clause of subsection (c) from the remainder of that subsection. In effect, the Seventh Circuit read subsection (c) as if it were written as follows:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court ~~and~~[. In addition to any other available remedies, such person] shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

See OR Pet. App. 111a-12a. This "reconstruction" of RICO § 1964(c) is simply another version of the argument that the word "and," rather than linking the private cause of action with the treble damages remedy, instead justifies construing subsection (c) as a blanket authorization for private parties to institute civil RICO suits for both treble damages and all equitable relief identified in subsection (a).

This argument is deeply flawed.

First, this reading is "bizarre and wholly unconvincing as a matter of plain English and the normal use of language."[19] If Congress had intended to take such a significant step as authorizing private RICO suits for injunctive relief -- and the text and legislative history, discussed above, decidedly refute any such intent -- it would be truly "bizarre" for Congress to do so by such an obscure and indirect means when Congress could simply have said so in plain language.

Second, the identical term "and" appears, in an indistinguishable context, in the Sherman antitrust statute, *see supra* § III(A)(2) ("Any person who shall be injured in his business or property . . . may sue therefor . . . *and* shall recover

---

[19] *Kaushal*, 556 F. Supp. at 582. *Accord Sedima*, 741 F.2d at 489 n.20.

threefold the damages . . .") (emphasis added), which this Court held does *not* authorize private suits for injunctive relief, *see Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917); *Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 67-68, 70-71 (1904). Moreover, the private treble damages provision of the Clayton antitrust act, 15 U.S.C. § 15, uses the term "and" in identical fashion. *Supra* p. 24. To read this word as implying that private litigants may also sue for injunctive relief would render the Clayton Act's separate, express authorization of private injunctive relief, 15 U.S.C. § 26, a meaningless redundancy.[20]

Third, the term "and," if anything, operates to *limit* the available relief to that explicitly set forth in RICO § 1964(c). Had that subsection merely authorized anyone injured in his business or property "to sue therefor," *period*, then there might be some ambiguity as to what relief would be available. But by spelling out that an injured person may sue "and recover threefold the damages he sustains," the statute leaves no doubt as to both the right and the remedy.

In short, the word "and" simply cannot bear the weight this argument places upon it.

2. Subsection (a) of § 1964 does not create a private injunctive remedy.

The argument has also been made that subsection 1964(a), which confers jurisdiction and authorizes certain remedies, should be read as creating remedies under RICO for both private parties and for the government. Under this reading, subsection (b) merely gives the government an *additional* right to equitable relief *pendente lite*, and subsection (c) merely gives private parties an *additional* right to treble damages, costs, and attorney fees. The Seventh Circuit appears to have embraced this

---

[20] *See Wollersheim*, 796 F.2d at 1087 & n.11; *Kaushal*, 556 F. Supp. at 583 & n.22; *Sedima*, 741 F.2d at 489 n.20; *DeMent*, 589 F. Supp. at 1382.

argument. OR Pet. App. 110a-11a.

This argument is defective.

First, this argument ignores the explicitly *jurisdictional* nature of subsection (a) ("The district courts . . . shall have jurisdiction to . . ."). *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 576-77 (1979) (rejecting the argument that a jurisdictional provision in a statute can give rise to cause of action: "[t]he source of plaintiff's rights must be found . . . in the substantive provisions . . ., not in the jurisdictional provision"). While subsection (a) authorizes equitable relief, it does *not* -- as the Seventh Circuit conceded, OR Pet. App. 113a -- specify which plaintiffs can seek the remedies it provides. For the answer to that question, recourse must be had to subsection (b) ("The Attorney General may institute proceedings under this section."). Thus, the subsection (a) argument depends entirely upon the premise that subsection (c) grants private plaintiffs -- and not just the Attorney General -- *plenary* authority to "institute proceedings under this section," an argument refuted above. *Supra* §§ III(A)(1), (C)(1).

Second, this argument again ignores the parallels to antitrust law. The very statute which this Court held did *not* authorize private injunctive relief, *supra* § III(A)(2), also contained a broad jurisdictional provision with language largely identical to subsection 1964(a). *See Northern Securities*, 194 U.S. at 67 (quoting text of § 4).

The Seventh Circuit perceived (OR Pet. App. 112a) support for its reasoning in this Court's decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1990). But reliance on *Steel Co.* is puzzling. That case merely rejected the claim that a provision giving courts "jurisdiction in actions brought under [a subsection]" made every element of the pertinent substantive subsection "jurisdictional." *Id.* Petitioners made no such argument regarding RICO.

3. RICO's "liberal construction" clause and general purposes do not create a private injunctive remedy.

Another argument the Seventh Circuit offered to justify reading into RICO a right of private injunctive relief is the legislative directive to construe RICO liberally to effectuate its purposes. OR Pet. App. 113a-14a. This argument is a make-weight. As this Court has explained, "RICO's 'liberal construction' clause . . . is not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). The meaning of RICO "must be gleaned from the statute through the normal means of interpretation." *Id.* at 184.[21]

The Seventh Circuit's invocation of the broad "underlying purposes" of RICO, OR Pet. App. 114a, is likewise no warrant for construing RICO contrary to its text and legislative history. "Our task here is not to determine what would further Congress's goal . . . but to determine what the words of the statute must fairly be understood to mean." *Holmes Group Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 833 (2002).

---

[21] As the Fifth Circuit observed:

> The "liberal construction" directive, however, neither compels nor authorizes us to disregard convincing evidence from the legislative history that Congress believed it had not approved private injunctive remedies and balked at doing so.

Fredeman, 843 F.2d at 830.

D. The United States as Amicus in *Scheidler II* Officially Opposed Construing RICO to Authorize Private Litigants to Invade the Attorney General's Exclusive Prerogative to Seek Equitable Relief.

In its amicus brief filed in *Scheidler II*, the United States agreed that "RICO does not authorize private parties to seek injunctive relief." U.S. Br. at 3, *Scheidler II* (*supra* p. 7).

The United States argued first that the text and structure of RICO "vests the Attorney General with the exclusive authority to bring suit for injunctive relief." *Id.* at 4.

> By empowering the Attorney General alone to institute proceedings "under this section," Congress signaled its intent that the district court's equitable jurisdiction under Section 1964(a) must be invoked by the Attorney General. There is no corresponding provision that authorizes a private party to institute proceedings "under this section" . . . .

Id.. Describing the Seventh Circuit's contrary reasoning as "flawed," *id.* at 8, the United States continued:

> As explained, Section 1964(b) expressly grants the Attorney General the right to bring actions under "this section," an obvious cross-reference to the court's power to award injunctive relief under Section 1964(a). Section 1964(c), by contrast, is a free-standing, self-contained grant of a private right to recover treble damages. The provision contains no express or implied reference to, or incorporation of, Section 1964(a).

Id.

The parallels between the remedy provisions of antitrust laws and RICO, the United States continued, "support the same conclusion." *Id.* at 9. In light of this Court's precedents recognizing that the pertinent provisions of the Sherman Act

"did not authorize private parties to bring suit for injunctive relief," *id.* at 10 (footnote and authorities omitted), "Congress is presumed to be aware when it enacted RICO that, absent inclusion of an *express* private right to obtain injunctive relief, the language it selected would be construed to exclude such a right," *id.* at 11 (emphasis in original). The absence of any such provision, the United States explained, "makes clear that Congress did not intend to create a private right to equitable relief under RICO." *Id.* at 12.

The legislative history of RICO, the United States observed, "confirms that Congress made a deliberate choice in omitting authority for a private injunctive action." *Id.* The United States pointed specifically to "repeated attempts to do so" -- all of which failed -- both before and after the passage of RICO. *Id.* at 13.

Finally, as a matter of policy, the United States argued that "[i]t is neither necessary nor appropriate to construe RICO implicitly to place . . . in private hands" the "wide-ranging injunctive relief, including divestiture and corporate reorganization and dissolution," which RICO empowered the Attorney General to seek. *Id.* at 14. Given the "rigor" of these remedies -- going so far as to include "corporate death" -- it is "not surprising," the United States reasoned, "that Congress entrusted the Attorney General, acting with 'official unity of initiative,' with the exclusive authority to obtain such relief." *Id.* (some editing marks and citations omitted).

* * *

By in effect amending RICO to authorize private civil suits for injunctive relief, the Seventh Circuit has abolished the federal government's exclusive prerogative to seek such relief. Not only is this an affront to a unique federal executive power, it is an open invitation to abuse. Under the decision below, private

parties are no longer limited to damages for the harm they suffered; they now can seek equitable relief wholly independent of, and potentially in conflict with, the decisions of the Attorney General regarding pursuit of such relief. "That holding could adversely affect the United States' ability to obtain equitable relief such as disgorgement when both private parties and the government seek such relief for the same conduct." U.S. Br., *Scheidler II*, p. 1.

Furthermore, private parties do not have the political accountability, or the duty to exercise prosecutorial discretion, that apply to the federal government. Under the Seventh Circuit's faulty interpretation, the RICO injunctive weapon can now be misused -- as in the present case -- as a means of waging political or commercial warfare against one's adversaries.

This Court should reverse the Seventh Circuit and hold that RICO does not authorize private injunctive relief.

IV. THIS COURT SHOULD LEAVE NO DOUBT THAT THIS CASE IS OVER.

The Seventh Circuit identified *no* grounds for further prolonging this lengthy case other than the possibility of granting some *injunctive relief under RICO*, based upon the theory that the Hobbs Act prohibits "*violence alone*," i.e., unconnected to robbery or extortion, and that this Court had overlooked and thus *not reversed four predicate acts* of actual or threatened violence. As demonstrated above, *each* of the three links in this chain of reasoning is independently flawed.

The Seventh Circuit not only failed to endorse any other theory for extending the litigation, but in fact affirmatively forbade any retrial or further development of the record

> [I]t is too late in the day for the plaintiffs to try to prove an

> entitlement to damages associated with [the "violence predicates.] They had their chance to do so when the case was tried in the district court, and there is nothing in the Supreme Court's opinion that would justify re-opening the original judgment on this point . . . . [Our remand on the "violence" predicates theory] is not . . . an invitation either to the court or to the parties to re-open that record. If there is anything at all that is to be done, it must be based on the record that has already been built.

OR Pet. App. at 7a-8a.

> In closing, we wish to re-emphasize that this remand is not a "green light" to start this old litigation anew. . . . [I]t is too late in the day for the plaintiffs to try to seek additional damages relief for acts that they could have addressed at the original trial.

Id. at 16a-17a.

Respondents did not seek certiorari to contest the Seventh Circuit's preclusion of damages, retrial, or reopening of the record. Hence, there is no basis for respondents to pursue still more litigation in this case.

The present case, at nineteen years of age, has long since passed the point at which NOW should be free to spend additional months and years pursuing new theories of liability. "Given the age of this case, remanding to the district court unnecessarily wastes additional judicial resources." *Id.* at 24a (dissent below). This Court should make clear beyond all doubt that petitioners are entitled to final judgment on *all* claims, and that the present case is *over*. As this Court said last time, "*all* of the *predicate acts* supporting the jury's finding of a RICO violation must be reversed, the *judgment* that petitioners violated RICO must also be reversed, [and] the *injunction* . . . must necessarily be vacated." *Id.* at. 48a (emphasis added).

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit and remand with instructions to direct the entry of judgment for petitioners on all claims.

Respectfully submitted,

Thomas P. Monaghan
John P. Tuskey
Laura B. Hernandez
Shannon D. Woodruff
Larry L. Crain
Robert W. Ash
American Center for Law
and Justice
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 226-2489

Jay Alan Sekulow
Counsel of Record
Walter M. Weber
Paul J. Larkin, Jr.
Stuart J. Roth
Vincent P. McCarthy
Ann-Louise Lohr
American Center for Law
and Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890

Attorneys for Petitioner Operation Rescue

September 2, 2005

Supreme Court, U.S.
FILED
OCT 21 2005
OFFICE OF THE CLERK

Nos. 04-1244 & 04-1352

In The Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, ET AL.,

Respondents.

OPERATION RESCUE, ET AL.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS

ERWIN CHEMERINSKY
Counsel of Record
Duke University School of Law
Science Drive & Towerview Rd.
Durham, North Carolina 27708
(919) 613-7173

PAUL HOFFMAN
SCHONBRUN DESIMONE
SEPLOW HARRIS & HOFFMAN
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

LAURIE LEVENSON
Loyola Law School
919 S. Albany Street
Los Angeles, California 90015
(213) 736-1149

CATHERINE FISK
Duke University School of Law
Science Drive & Towerview Rd.
Durham, North Carolina 27707
(919) 613-7196

FAY CLAYTON
ADAM HIRSCH
ROBINSON, CURLEY
& CLAYTON, P.C.
300 S. Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

LOWELL E. SACHNOFF
JACK L. BLOCK
CASEY WESTOVER
SACHNOFF & WEAVER, LTD.
10 S. Wacker Drive
Chicago, Illinois 60606
(312) 207-1000

FRANK SUSMAN
101 South Hanley,
Ste. #1700
St. Louis, Missouri 63105
(314) 615-6000

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly remanded the case to the District Court to determine whether any injunction in this case could be based on the jury's finding of four counts of violence and threats of violence in violation of the Hobbs Act, 18 U.S.C. §251, and if so, to decide a question of law that had not been previously addressed in this litigation, including by this Court.

2. Whether the Hobbs Act prohibits physical violence or threats of physical violence against persons or property undertaken pursuant to a plan to interfere with interstate commerce without any connection to robbery or extortion.

3. Whether private civil litigants may obtain injunctive relief under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §1964.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Statement of the Case	1
Statement of the Facts	2
Summary of Argument	9
Argument	12
I. THE SEVENTH CIRCUIT'S DECISION TO EFFECTUATE THIS COURT'S MANDATE BY REMANDING THIS CASE TO THE DISTRICT COURT TO DETERMINE WHETHER AN INJUNCTION SHOULD ISSUE AND TO DECIDE AN IMPORTANT ISSUE OF FEDERAL LAW, NOT PREVIOUSLY ADDRESSED BY ANY COURT IN THIS CASE, SHOULD BE AFFIRMED	12
A. The Prior Decision Of This Court Did Not Consider Or Decide Whether The Hobbs Act Prohibits Physical Violence Or Threats Of Physical Violence In Interstate Commerce Apart From Extortion Or Robbery	12
B. This Court Should Either Affirm The Court Of Appeals' Decision To Remand The Case Or Dismiss Certiorari As Having Been Improvidently Granted	19
II. THE HOBBS ACT PROHIBITS PHYSICAL VIOLENCE AND THREATS OF PHYSICAL VIOLENCE INTENDED TO INTERFERE WITH INTERSTATE COMMERCE	21

TABLE OF CONTENTS – Continued

		Page
	A. The Plain Language Of the Hobbs Act Is Clear And Must Be Followed	21
	B. There Is No Reason To Reject The Literal Language Of The Hobbs Act	31
III.	RICO PERMITS PRIVATE LITIGANTS TO SEEK INJUNCTIVE RELIEF	37
	A. RICO Expressly Authorizes Injunctive Relief to Private Parties	38
	B. RICO Does Not Strip Courts of Equitable Powers By Implication	42
	C. RICO's Legislative History Does Not Support Petitioners	44
	D. Private Injunctions Serve RICO's Express Purposes	46
Conclusion		48

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 27

Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977) 43

Bennett v. Spear, 520 U.S. 154 (1997) 11, 23

Blue Cross v. Marshfield Clinic, 152 F.3d 588 (7th Cir. 1998) 47

Branch v. Smith, 538 U.S. 254 (2003) 36

Califano v. Yamasaki, 442 U.S. 682 (1979) 37, 40, 41

Callanan v. United States, 364 U.S. 587 (1961) 35

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) 41

Charles Wolff Packing Co. v. Court of Indus. Relations, 267 U.S. 552 (1925) 15, 16

Ex Parte Collett, 337 U.S. 55 (1949) 33

Connecticut National Bank v. Germain, 503 U.S. 249 (1992) 39

Continental Casualty Co. v. United States, 314 U.S. 527 (1942) 32

Court of Indus. Relations v. Chas. Wolff Packing Co., 219 P. 259 (Kansas 1923) 16

Duignan v. United States, 274 U.S. 195 (1927) 20

Duncan v. Walker, 533 U.S. 167 (2001) 27

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 31, 38

TABLE OF AUTHORITIES – Continued

Page

Federal Communication Commission v. Pacifica Foundation, 438 U.S. 726 (1978) 24

Federal Energy Regulatory Comm'n v. Martin Exploration Management Co., 486 U.S. 204 (1988) 10

Flast v. Cohen, 392 U.S. 83 (1968) 21

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) 12, 40

Garcia v. United States, 469 U.S. 70 (1984) 44

Glover v. United States, 531 U.S. 198 (2001) 13, 19

Grupo Mexicano v. Alliance Bond Fund, 527 U.S. 308 (1999) 40

H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) 41

Huddleston v. United States, 415 U.S. 814 (1974) 35

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 34

Immigration and Naturalization Serv. v. Nat'l Ctr. for Immigrants' Rights, 502 U.S. 183 (1991) 28

JEM AG Supply v. Sperber Adams Associates, 524 U.S. 124 (2001) 36

K-Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 10, 22

Lopez v. Davis, 531 U.S. 230 (2001) 14

Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990) 20

Minnesota v. Northern Securities Co., 194 U.S. 48 (1904) 42, 43

Montclair v. Ramsdell, 107 U.S. 147 (1883) 27

TABLE OF AUTHORITIES – Continued

Page

Mutual Life Insurance Co. v. Hill, 193 U.S. 551 (1904) 15

NOW v. Scheidler ("NOW I"), 510 U.S. 249 (1994) 1, 41

National Organization for Women v. Scheidler, 91 Fed.Appx. 510 (7th Cir. 2004) 9

National Organization for Women v. Scheidler, 396 F.3d 807 (7th Cir. 2005) 2, 15

Neal v. United States, 516 U.S. 284 (1996) 34

NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998) 14

O'Gilvie v. United States, 519 U.S. 79 (1996) 36

Paine Lumber Co. v. Neal, 244 U.S. 459 (1917) 42, 43

Patrick v. Burget, 486 U.S. 94 (1988) 20

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 34

Rector of Holy Trinity Church v. United States, 143 U.S. 457 (1892) 28

Reves v. Ernst & Young, 507 U.S. 170 (1993) 41

Reiter v. Sonotone Corp., 422 U.S. 330 (1979) 24

Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986) 44

Roberts v. Galen of Virginia, Inc., 525 U.S. 249 (1999) 18

Rotella v. Wood, 528 U.S. 549 (2000) 47

Russello v. United States, 464 U.S. 16 (1983) 30

Salinas v. United States, 522 U.S. 52 (1997) 41, 44

In re Sanford Fork & Tool Co., 160 U.S. 247 (1895) 17

TABLE OF AUTHORITIES – Continued

Page

Scheidler v. National Organization for Women (NOW II), 537 U.S. 393 (2003) ..... *passim*

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 41, 43, 45, 47

Staples v. United States, 511 U.S. 600 (1994) 35

State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967) 30

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 38

Tafflin v. Levitt, 493 U.S. 455 (1990) 43

Toyota Motor Mfg., Ky., Inc. v. Willians, 535 U.S. 184 (2002) 13

United States v. Bird, 401 F.3d 633 (5th Cir. 2005), *cert. denied*, 2005 WL 150754 (October 3, 2005) 37

United States v. Craft, 535 U.S. 274 (2002) 45

United States v. Culbert, 435 U.S. 371 (1978) 22

United States v. Enmons, 410 U.S. 396 (1973) 23

United States v. Franks, 511 F.2d 25 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975) 23

United States v. Gregg, 226 F.3d 253, *cert. denied*, 532 U.S. 971 (2001) 37

United States v. Menasche, 348 U.S. 528 (1955) 27

United States v. Oregon & C.R. Co., 164 U.S. 526 (1896) 28

United States v. Palmer, 16 U.S. 610 (1818) 28

United States v. Ron Pair Enters, 489 U.S. 235 (1989) 10, 22

TABLE OF AUTHORITIES – Continued

Page

United States v. Stirone, 361 U.S. 212 (1960) 11, 22

United States v. Wells, 519 U.S. 482 (1997) 30

United States v. Weslin, 156 F.3d 292 (2d Cir. 1998) (*per curiam*), *cert. denied*, 525 U.S. 1071 (1999) 37

United States v. Wilson, 154 F.3d 658 (7th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999) 37

United States v. Yankowski, 184 F.3d 1071 (9th Cir. 1999) 23

United States v. Franks, 511 F.2d 25 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975) 23

United States v. Turkette, 452 U.S. 576 (1981) 44

Virginia v. Black, 538 U.S. 343 (2003) 7

West v. Gibson, 527 U.S. 212 (1999) 14

Yee v. City of Escondido, 503 U.S. 519 (1992) 19

STATUTES

Judiciary Act of 1789, 1 Stat. 73 11

15 U.S.C. §25 43

15 U.S.C. §26 43

18 U.S.C. §2 26

18 U.S.C. §248 8

18 U.S.C. §§420a-420e 29

18 U.S.C. §1361 32

18 U.S.C. §1951 ..... *passim*

18 U.S.C. §1952 1

18 U.S.C. §1964 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Pub. L. No. 91-452, §904(b), 84 Stat. 922 ..... 12, 41, 46

Pub. L. No. 486, 60 Stat. 420 (1946) 31

Pub. L. No. 772, 62 Stat. 793-94 (1948) 31

MISCELLANEOUS

William W. Barron, The Judicial Code, 8 F.R.D. 439 (1948-49) 30

G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO*, 62 Notre Dame L. Rev. 526 (1987) 45

Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129 (1994) 25, 32

Ronald Benton Brown and Sharon Jacobs Brown, Statutory Interpretation: The Search for Legislative Intent (2002) 36

Moore's Federal Practice §408.100[4] 15

2A Norman Singer, Statutes and Statutory Construction (6th ed. 2000) 28

STATEMENT OF THE CASE

This lawsuit began 19 years ago as a result of the violent activities of the Petitioners, including Operation Rescue and its leaders, illegally blocking access to women's health facilities. The final amended complaint was filed by the Respondents, the National Organization for Women (NOW), Delaware Women's Health Organization, and Summit Women's Health Organization, primarily under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1964.

After a seven-week trial, a unanimous jury returned a detailed verdict on April 20, 1998, including four pages of special interrogatories, and found Petitioners responsible for operating their enterprise, the Pro-Life Action Network (PLAN), through a pattern of 121 RICO predicate acts.[1] The jury found that the Petitioners committed 21 violations of federal extortion law (the Hobbs Act, 18 U.S.C. §1951), 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act (18 U.S.C. §1952), 23 instances of attempting to violate the Travel Act, and four "acts or threats of physical violence to any person or property" in violation of the Hobbs Act. On this basis, the jury awarded damages to the two named clinics, and after additional evidence on the need for injunctive relief, the district court issued a permanent nationwide injunction prohibiting Petitioners from conducting blockades, trespassing, damaging property, or committing acts of violence directed at the clinics. The injunction has not affected

[1] The trial in the district court occurred after this Court held in *NOW v. Scheidler*, 510 U.S. 249 (1994) ("*NOW I*"), that RICO has no "economic motive" requirement.

peaceful protests, but has brought an end to a lengthy campaign of threats and violence intended to shut down women's health facilities that offer abortion services.

This Court, in *Scheidler v. National Organization for Women* (*NOW II*), 537 U.S. 393 (2003), after concluding that Petitioners had not committed extortion within the meaning of the Hobbs Act, reversed as to the 117 extortion counts. The Court did not mention or discuss the four counts of violence or threats of violence in violation of the Hobbs Act.

On remand, the Seventh Circuit concluded that these four counts of the jury's verdict were not addressed by this Court's ruling. 396 F.3d 807 (7th Cir. 2005). The Court of Appeals remanded the case to the District Court to determine whether the Hobbs Act, 18 U.S.C. §1951, applies to violence apart from extortion or robbery and whether an injunction could be based on these four counts. Rather than wait for a determination from the District Court on these issues, Petitioners sought review in this Court and certiorari was granted.

STATEMENT OF THE FACTS

Respondents proved at trial that PLAN's nationwide pattern of crimes included violent assaults and physical attacks on patients, doctors, clinic staff, and police, plus destruction of medical equipment, supplies, and other clinic property. Abundant evidence showed that PLAN members regularly assaulted clinic personnel and patients: they beat on their cars, hit and clawed them, choked them, threw them to the ground, shoved and elbowed them, and slammed them against buildings, even

as the victims begged to be let go because they were being crushed. SPA 4a; RA 27a-29a, 31a-34a, 36a-37a; T 1551, 4824-26, 4829.

Patients seeking treatment for a variety of health problems were attacked by PLAN members to keep them from their appointments. RA 31a-32a, 35a-37a; T 1914-17. One fertility patient tried desperately to get through a blockade because she was ovulating and needed insemination that day, but PLAN members grabbed her and pulled her into their midst; even with police assistance, she was unable to get into the clinic. RA 31a. At a Los Angeles clinic, PLAN members grabbed the arms and legs of an ovarian surgery patient who was due to receive post-operative treatment there. When she continued to attempt to access medical services, PLAN members pulled her hair, struck her, and beat her with an anti-abortion sign until her sutures ruptured and she passed out. SPA 2a, 4a-5a; RA 35a-37a; T 1519-20, 1522.

PLAN's crimes by force and violence, proved at trial, also included the following: In Cherry Hill, New Jersey, PLAN members made human chains and violently pushed back clinic staff who were trying to keep a corridor open for their patients, causing property damage. T 4822-25; PX 1441. A PLAN member grabbed the clinic administrator by the hair and threw her to the sidewalk. T 4824-26, 4829.

PLAN leaders repeatedly invaded the Delaware Women's Health Organization clinic; they destroyed medical equipment and medications, tore down cabinets, and chained themselves to operating tables; they threatened the administrator to induce her to leave her job. RA 23a-24a, 29a-30a; SPA 111a. In Pensacola, they ransacked a clinic, destroyed medical equipment, attacked a staff

member and a volunteer, slamming them against the wall and causing spinal damage to both women. RA 33a-35a, 43a-44a; T 1471-72, 4012-26.

In Wichita, after forcing a clinic to close for a week, PLAN members barricaded the entrances, surrounded and beat on patients' cars, and grabbed and bruised patients trying to pass through corridors made by federal marshals. RA 25a-28a; T 1088-89; PX 312, 413. Similar assaults and otherwise violent conduct occurred in Atlanta, RA 37a-38a; T 1551-52; Milwaukee, SPA 111a; T 1871-72, 1914; Lake Forest, Illinois, RA 44a; and elsewhere, SPA 5a, 110a; PX 513; T 1209-11; RA 38a-40a, 45a.

None of the 121 RICO predicate acts found by the jury was a peaceful or legal act, such as a sit-in or blockade. SPA 126a, n.6. At Petitioners' request, T 4488-90, one interrogatory, Q6, asked the jury whether any predicate act was "based solely on blockades of clinic doors or sit-ins within the clinics, without more?" The jury answered, "No."

PLAN's chosen tactic was a form of forcible invasions and blockades that PLAN aptly called "blitzes," SPA 135a; RA 13a; PX 801, p. 13; T 1018, and, later called "rescues," which entailed whatever force was necessary to induce clinics to close and patients to give up their contracts for medical services. SPA 2a, 5a, 111a, 134a; RA 13a, 42a-44a; PX 628, p. 14; T 980-01, 1006-07, 1970, 3660-61. PLAN Director Randall Terry's public definition of "rescue" made it clear that force was authorized:[2] PLAN leaders told

[2] Terry, Operation Rescue's first National Director, T 1823-24, settled with Respondents before trial and agreed to permanent injunctive relief.

clinics to "close or be closed" by their "blitzes." SPA 115a; RA 17a, 19a-20a. Each of the attacks presented to the jury involved the use or threat of force or violence. T 5005.

PLAN was formed specifically to target medical providers across the nation, PX 140, and its leaders, including PLAN founder and Director Scheidler, publicly endorsed and advocated the use of force and violence. T 1910. PX 628, p.14. Scheidler praised those who violently invaded the Pensacola Ladies' Center and brutally attacked its staff for the "good job" they did in terrorizing the clinic and its patients. RA 15a, 34a-35a. Scheidler also stated that he did not consider arson and bombings to be "violence." *Id.*

Over the fourteen years of its operation, PLAN mobilized anywhere from a few dozen to thousands of members from many states to carry out its "blitzes" in cities across the country. PX 17A, 1084; T 1374. In addition to the crimes detailed above, PLAN orchestrated violent attacks in Chicago, Illinois; Farmington, Michigan; Jackson, Mississippi; Dobbs Ferry, New York; New York City, New York; Fargo, North Dakota; San Antonio, Texas; and in other locations. SPA 110a, 116a; T 1078.

Since PLAN's strategy was to overwhelm local law enforcement and close clinics without suffering any legal consequences, SPA 114a; T 3938, 4815-16; RA 8a, PLAN leaders targeted cities where they thought law enforcement resources were weak; alternatively, they amassed so many "blitzers" that even well-staffed police forces could not stop them, e.g., RA 26a-27a. Clinics that obtained territorially limited injunctions from local courts fared little better than those with none; PLAN leaders tore up court orders and continued with their violent "blitzes." PX

468, 1098; T 1068-69. As the trial court found, geographically limited injunctions had failed to prevent PLAN's crimes; PLAN would either ignore the injunctions altogether or move its operations to new jurisdictions. SPA 134a-135a.

It was not just abortion patients who were targeted for violence. Respondent clinics offered a broad range of services, including gynecological treatment and adoption assistance, and PLAN targeted every woman trying to enter, including those with appointments for cancer screening, fertility treatment, and annual physicals, as well as those with appointments to purchase contraceptive products and counseling, SPA 111a-12a; PX 108; T 1914, 1368, 2552-54. As Scheidler explained the rationale for the violence and threats of violence, "we don't want them to go in for any service . . . ; it just keeps the abortionists in business." *Id.*

Petitioners were all high-ranking PLAN leaders who organized and participated in the pattern of crimes that included violence and threats of violence in interstate commerce. SPA 19a, 113a-116a. Before holding a Petitioner liable, the jury was required, in addition to finding that each Petitioner operated or managed the enterprise through a pattern of predicate crimes, to find that each crime on which liability was based was committed "knowingly, willfully and wrongfully." *Id.*

The trial judge commented that the proof that Petitioners authorized or ratified the crimes was voluminous enough "to fill up this courtroom." T 4563-64. Thus, crimes committed unintentionally or without PLAN's approval could not, and did not, trigger liability. In addition, the trial judge required that crimes committed by any alleged

PLAN member be closely tied to Petitioners; thus there was no risk that violence unauthorized by PLAN might be imputed to Petitioners. T 10-90 (2/27/98).

Respondents did not challenge Petitioners' right to engage in protected speech, even when it was unwelcome, uninvited, insulting, or outrageous. To the contrary, Respondents and the trial court reminded the jury that even offensive speech receives First Amendment protection.[3] Thus, the verdict was not based on Petitioners' lawful conduct or their anti-abortion message.

The evidence established far more than mere "interference" with the rights of clinics and patients. The jury was instructed that each predicate act of extortion had to be based on the "wrongful" use of force, violence or fear, and that constitutionally protected and other lawful conduct was excluded.

After the jury rendered its unanimous verdict, the district court took additional evidence on whether an injunction was necessary. Despite Petitioners' contention that they had abandoned their wrongful conduct after

---

[3] T 5118. Respondents joined Petitioners in asking that the jury be instructed: "Nor is the right to engage in peaceful protest an issue in this lawsuit. The parties agree that peaceful picketing, leafleting and participating in the legislative process are activities protected by the First Amendment of the United States Constitution." R1101, Final Pretrial Order, Agreed Instruction #18. Damages had to flow exclusively from the criminal acts, not from constitutionally protected speech that may have accompanied it. Respondents' counsel reminded the jury not to include any protected conduct in the predicate acts. T 5118. These jury instructions and admonitions were intended to ensure that only violence and true threats of violence, which are not protected by the First Amendment, *see, e.g., Virginia v. Black*, 538 U.S. 343 (2003), were punished by the verdict and enjoined by the court.

enactment of the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. §248 (1994), the trial court found that PLAN's pattern of crimes had continued unabated. Even when FACE injunctions had been issued against PLAN members, they continued to cross state lines to promote and carry out their violent crimes in new jurisdictions. SPA 134a. The district court therefore concluded that an injunction was necessary. SPA 133a.

The Seventh Circuit affirmed the judgment and the injunction. Its decision expressed hope that the injunction would end the violence and promote peaceful discourse: "[P]erhaps in the end the injunction may further rational discourse on one of the most volatile political controversies facing the nation today. Violence in any form is the antithesis of reasoned discussion. By directing those with passionate views about the abortion controversy – on either side – away from the use of threats and violence and back to 'all the peaceful means for gaining access to the mind,' the injunction the district court issued is in harmony with the fundamental First Amendment protection of free speech." SPA 25a. To a significant extent, that hope has been fulfilled; the injunction ended PLAN's reign of terror, and in the ensuing seven years, no formal enforcement action has been necessary. It has not put an end to lawful protest.

This Court, in 2003, reversed, concluding that extortion requires that there be an attempt to obtain property, which was not present in this case. The Court stated: "Because we find that petitioners did not obtain or attempt to obtain property from respondents, we conclude that there was no basis upon which to find that they committed extortion under the Hobbs Act." 537 U.S. at 408. The Court remanded the case for further proceedings.

On remand, the Seventh Circuit noted that this Court had not considered the four counts of the jury's verdict based on violence and threats of violence designed to interfere with interstate commerce. The Seventh Circuit "remand[ed] [the case] to the district court to determine whether the four predicate acts involving 'acts or threats of physical violence to any person or property' are sufficient to support the nationwide injunction that it imposed." *National Organization for Women v. Scheidler* (unpublished order), 91 Fed.Appx. 510, 513 (7th Cir. 2004). The Court of Appeals said that as part of this inquiry, the district "court may find it necessary to interpret the language of the Hobbs Act. . . . Specifically, the court may need to determine whether the phrase "commits or threatens physical violence to any person or property" constitutes an independent ground for violating the Hobbs Act, or rather, relates back to the grounds of robbery or extortion." *Id.*

SUMMARY OF ARGUMENT

In its prior ruling in this case, *NOW II*, this Court reversed as to 117 of the 121 counts found by the jury that were based on extortion, concluding that there was not extortion because the violent actions of Petitioners were not intended to enrich them. The petition for certiorari did not raise, the merits briefs did not discuss, and this Court did not consider the four counts of the jury's verdict that were based on physical violence and threats of physical violence under the Hobbs Act.

The Seventh Circuit, on remand from this Court, recognized this and remanded the case to the district court

to determine whether these four counts were sufficient to sustain the nationwide injunction and, if so, whether the Hobbs Act prohibits violence and threats of violence designed to interfere with interstate commerce apart from extortion or robbery. No court in this litigation has addressed that question. The Seventh Circuit appropriately remanded this case for these issues to be determined in the first instance by the district court and this Court should affirm this order rather than unnecessarily decide issues not yet considered by the lower courts. If, for example, the four counts of physical violence are deemed inadequate to support the injunction, then there is no need to address the meaning of either the Hobbs Act or the RICO statute.

If this Court reaches the issues of statutory interpretation raised in this case, they are answered by the most basic rule of statutory construction: the plain meaning of a statute is controlling and must be followed. *See, e.g., United States v. Ron Pair Enters*, 489 U.S. 235, 242 (1989); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Federal Energy Regulatory Comm'n v. Martin Exploration Management Co.*, 486 U.S. 204, 209 (1988).

As to the meaning of the Hobbs Act, the statute provides that whoever obstructs interstate commerce "by robbery or extortion, or attempts or conspires so to do, *or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section* shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. §1951(a) (emphasis added). The plain language of the statute thus prohibits three separate activities that interfere with interstate commerce: 1) robbery (and attempts or conspiracies to commit robbery), or 2) extortion (and

attempts and conspiracies to commit extortion), or 3) physical violence and threats of physical violence (that are part of a plan to obstruct interstate commerce). This Court has stressed that the Hobbs Act "speaks in broad language," and that Congress has chosen to use "all constitutional power" "to punish interference with interstate commerce by extortion, robbery, *or physical violence*." *United States v. Stirone*, 361 U.S. 212, 215 (1960) (emphasis added).

The interpretation of the Hobbs Act urged by Petitioners and the United States, that the law is limited to extortion or robbery, would render meaningless the Act's clear statement that it prohibits extortion or robbery *or physical violence or threats of physical violence* designed to interfere with interstate commerce. Petitioners' interpretation, which would nullify an entire clause of the Act, violates "the cardinal principle of statutory construction" that the Court must "give effect to every clause and word of a statute." *Bennett v. Spear*, 520 U.S. 154, 173 (1997).

Likewise, the other statutory question raised by this case, whether injunctions are allowed as a remedy in civil RICO actions, is also resolved by the plain meaning of the statute. Section 1964(a) unambiguously gives district courts broad power to remedy RICO violations, including the power "to prevent and restrain violations of section 1962" and to "impos[e] reasonable restrictions on the future activities" of statute violators. Moreover, federal courts are presumed to retain all of the equitable powers conferred by the Judiciary Act of 1789, 1 Stat. 73, 78, unless a statute clearly denies such equitable relief. This Court has long required the "clearest command" from Congress before federal courts can be stripped of their

equitable powers. *See, e.g., Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992). Nothing in the RICO Act or its legislative history indicates any congressional intent to strip federal courts of their inherent equitable powers. Moreover, denying federal courts the injunctive power expressly provided by the Act and traditionally exercised by federal courts would contradict Congress's express command that the RICO statute "be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, §904(a), 84 Stat. 922, 947 (1970).

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION TO EFFECTUATE THIS COURT'S MANDATE BY REMANDING THIS CASE TO THE DISTRICT COURT TO DETERMINE WHETHER AN INJUNCTION SHOULD ISSUE AND TO DECIDE AN IMPORTANT ISSUE OF FEDERAL LAW, NOT PREVIOUSLY ADDRESSED BY ANY COURT IN THIS CASE, SHOULD BE AFFIRMED

A. The Prior Decision Of This Court Did Not Consider Or Decide Whether The Hobbs Act Prohibits Physical Violence Or Threats Of Physical Violence In Interstate Commerce Apart From Extortion Or Robbery

In *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003), this Court focused entirely on the meaning of extortion. The Court did not consider, explicitly or implicitly, whether the Hobbs Act's plain language prohibits physical violence or threats of violence in interstate commerce unconnected to extortion or robbery. Nor did

this Court consider whether the injunction in this case could stand based on the four counts of physical violence and threats of physical violence found by the jury that did not include extortion or robbery. In accord with well-settled precedent and practice, the Seventh Circuit appropriately remanded this case to the District Court for resolution of this unresolved issue which no court in this case previously had addressed. Compelling reasons support affirming the Seventh Circuit's remand.

First, the issues presented to this Court for its prior decision focused entirely on the meaning of "extortion" and the availability of injunctions under civil RICO. No issue was presented concerning whether the Hobbs Act prohibits physical violence or threats of physical violence apart from extortion or robbery. The first paragraph of this Court's opinion makes this clear: "We granted certioriari in these cases to answer two questions. First, whether petitioners committed extortion within the meaning of the Hobbs Act. Second, whether respondents, as private litigants, may obtain injunctive relief in a civil action pursuant to . . . the Racketeer Influenced and Corrupt Organization Act." 537 U.S. at 397 (citations omitted).

This Court granted certiorari limited to these questions and nothing within the issues presented asked for consideration of whether the Hobbs Act applies to acts of violence apart from extortion or robbery. *See* Pet. for Writ Cert., *Scheidler v. Nat'l Org for Women* (No. 01-1118). This Court consistently has adhered to Supreme Court Rule 14.1(a), which provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." *See Toyota Motor Mfg., Ky., Inc. v. Willians*, 535 U.S. 184, 202 (2002); *Glover v. United States*, 531 U.S. 198, 205 (2001). This Court frequently has explained that

it will not decide issues outside the questions fairly presented by a petition for a writ of certiorari. *See, e.g., Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001); *West v. Gibson*, 527 U.S. 212, 223 (1999); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 140 (1998). Therefore, the issue of whether the Hobbs Act prohibits violence and threats of violence, apart from extortion or robbery, was not presented to this Court.

Second, quite appropriately then, this Court did not decide the question of whether the Hobbs Act applies to acts of physical violence or threats of physical violence apart from extortion or robbery. The Court clearly stated its holding: "[P]etitioners did not commit extortion because they did not 'obtain' property from respondents as required by the Hobbs Act," and this determination "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." 537 U.S. at 397. Nothing in the Court's opinion addressed, or even alluded to, the issue of whether the Hobbs Act prohibits physical violence or threats of physical violence apart from extortion or robbery. The Court did not even mention the four counts of violence unrelated to extortion in its statement of the facts underlying the appeal. *See* 537 U.S. at 399. This Court's opinion focused entirely on the meaning of extortion within the Hobbs Act.

The Seventh Circuit thus was correct in finding that this issue was not resolved by this Court's earlier decision. As the Court of Appeals explained: "We note that the Court's opinion in *NOW II* makes no mention of these four predicate acts, and the parties' briefs before the Court reference these acts only in passing in footnotes. To conclude that the Court found these four predicate acts insufficient to support the district court's injunction would therefore require that we find both that the Court went

beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion. We decline to draw such a conclusion." *NOW v. Scheidler*, 396 F.3d 807, 811 (7th Cir. 2005).

Third, the Court of Appeals reasonably and correctly concluded that the single sentence at the end of the Court's opinion, that it had addressed all of the grounds for the injunction, was mistaken. The Court ended its opinion in *NOW II* by stating: "Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." *Scheidler*, 537 U.S. at 411.

Quite clearly, all of the predicate acts supporting the jury's verdict had *not* been addressed by the Court. Extortion was the basis for 117 of the counts, but reversing those still left four counts based on violence and threats of violence unresolved.

The law is clear that "[i]f the Court reverses a judgment, only those portions of the judgment that the Court addresses and decides are affected." Moore's Federal Practice §408.100[4]. For example, in *Mutual Life Insurance Co. v. Hill*, 193 U.S. 551, 553-54 (1904), this Court explained: "[T]he rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."

This Court's decision in *Charles Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552, 562 (1925), is particularly apt. When the *Charles Wolff* litigation was in the Supreme Court the first time there were two questions

before the Court: (1) the validity of a schedule of wages, and (2) a regulation of maximum hours imposed by statute on the Charles Wolff Packing Company. The Court held the schedule of wages invalid and, without giving any explanation, never addressed the maximum hours issue.

On remand, the Kansas Supreme Court struck all mention of wages from its order, but left in place the regulation of hours. *See Court of Indus. Relations v. Chas. Wolff Packing Co.*, 219 P. 259 (Kansas 1923). When the Charles Wolff Company brought the case back to the Supreme Court it "insist[ed] that by reversing the original judgment of the state court, and not merely a part of it, [the Supreme Court] adjudged the invalidity of the entire Act." *See Chas. Wolff II*, 267 U.S. at 562. The Supreme Court rejected Wolff's argument and held that the failure to address a question that was properly before the Supreme Court is not an adjudication of its merits. *Id.*

The situation in the present case makes it even less appropriate to consider the failure to address a question as adjudication of its merits. Not only did this Court not address whether the Hobbs Act applies to physical violence and threats of physical violence without extortion or robbery, the issue was not addressed or ruled on by the District Court or the Court of Appeals, was not included in the petition for certiorari or the grant of certiorari, and was neither briefed nor argued before this Court.

Fourth, the Seventh Circuit's action remanding the case to the District Court was completely consistent with the mandate of this Court. This Court did not enter judgment, but instead reversed the judgment and remanded the case. This Court certainly had the authority to enter a judgment for the Petitioners, but did not do so.

Instead, the certified judgment, issued by the Clerk of the Supreme Court and sent to the Seventh Circuit merely says that the cases are "reversed . . . and . . . remanded . . . for further proceedings in conformity with the opinion of this Court." Certified Copy of Judgment in *Scheidler v. National Organization for Women* (Sent by Office of the Clerk, Supreme Court of the United States to Clerk, United States Court of Appeals for the Seventh Circuit, March 28, 2003).

Petitioner Operation Rescue is wrong in its statement that the Seventh Circuit's order was "direct defiance of this Court's ruling." Operation Rescue Br. at 9. Quite the contrary, the Seventh Circuit's opinion on remand is in full compliance with the Supreme Court's mandate because the Seventh Circuit opinion effectively directs the District Court to set aside the original injunction. In compliance with the Supreme Court's judgment authorizing "further proceedings in conformity with the opinion of [the Supreme Court]," the Seventh Circuit directed the District Court to institute additional proceedings to determine whether to impose a new injunction based on the four remaining predicate offenses that were not before the Supreme Court in its prior ruling in this litigation.

In fact, this Court's decisions make clear that the Court of Appeals acted entirely appropriately in considering issues not addressed by this Court. As this Court explained in *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895): "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. . . . But the Circuit Court may consider and decide any matters left open by the mandate of this court."

Petitioners' argument would result in needless litigation in this Court and an extremely inefficient allocation of judicial resources. Petitioners' proposed rule would require every respondent to raise in this Court every conceivable alternative ground to support the lower court's judgment, whether or not those grounds were fairly included in petitioners' question presented. If a respondent failed to do so, and if the Court's remand instructions did not explicitly direct the lower courts to address such issues, under Petitioners' theory, all alternative grounds would be automatically extinguished, without any briefing or consideration of the merits.

This Court never has required respondents to raise alternative grounds for affirmance that go beyond the issues presented in the grant of certiorari. In fact, the rule is the opposite. In *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992), this Court explained that by limiting its consideration to the questions presented in the petition, the Court avoids forcing respondents to address other issues. Where, as here, "the decision below involves issues on which the petitioner does not seek certiorari, the respondent would face the formidable task of opposing certiorari on every issue the Court might conceivably find present in the case." *Id.* at 536. In fact, when respondents do raise alternative grounds, the Court generally refuses to address them. *See, e.g., Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54 (1999).[4]

[4] Nor are Petitioners correct in their assertion that in the prior proceedings in this Court "NOW conceded that its Hobbs Act predicates *all* hinged on extortion." Operation Rescue Br. at 11 n.8. At no point did Respondents say or imply this. Petitioner presented the issue to this Court as to the meaning of extortion under the Hobbs Act and that is

(Continued on following page)

There is no merit to the Petitioners' claim that the National Organization for Women and the other Respondents should have sought rehearing in this Court. Scheidler Br. at 14-15. As explained above, the question of whether the Hobbs Act applies to violence or threats of violence was not presented in the grant of certiorari or the merits briefs and was not addressed by the Court. Thus, NOW and the other Respondents were not seeking a reconsideration of an issue decided by the Supreme Court; they were asking the Court of Appeals to consider an issue that had been decided by the jury, but not ruled on by that court or this Court. The appropriate recourse was on remand to ask that the Court of Appeals consider the remaining four counts based on violence and threats of violence apart from extortion. There certainly is nothing in the Rules or decisions of this Court requiring the Respondents to have sought rehearing of an issue not presented and not decided in order to raise that issue on remand.

B. This Court Should Either Affirm The Court Of Appeals' Decision To Remand The Case Or Dismiss Certiorari As Having Been Improvidently Granted

Ordinarily, the Supreme Court will not decide a question that was "neither raised nor resolved" in the lower courts. *Glover v. United States*, 531 U.S. at 205. In *Yee v. City of Escondido*, this Court refused to consider the

---

what Respondents addressed and this Court decided. Petitioners did not raise, and thus Respondents did not brief and this Court did not consider, the issue of whether the Hobbs Act should be understood as prohibiting violence or threats of violence apart from extortion or robbery. That issue is now before this Court for the first time.

question whether the government's action was a regulatory taking, because that had not been decided in the lower court proceedings. As this Court explained: "Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." 503 U.S. at 538. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552, n.3 (1990) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion"). In countless cases, this Court has declared that it will not rule on questions that have not yet been addressed by the lower courts. In *Patrick v. Burget*, 486 U.S. 94, 99 (1988), the Court explained: "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court. We see no reason to depart from this practice in the case at bar. Accordingly, we take no position on the evidentiary question raised by petitioner." *Id.* at 99 n.5. *See also Duignan v. United States*, 274 U.S. 195, 200 (1927) ("This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.").

Since the Court of Appeals has never considered the issue of whether the Hobbs Act prohibits violence and threats of violence apart from extortion and robbery, it appropriately remanded the case to the District Court. This Court should do exactly that, allowing the District Court to consider the issue, followed by appeal to the Seventh Circuit and the possibility of review in this Court.

In fact, there is a compelling reason for this Court either to affirm the Court of Appeals and remand the case to the Seventh Circuit or dismiss certioriari as having been improvidently granted. The Court of Appeals acknowledged that there was an important issue of whether the injunction could be upheld based on the four counts of violence and threats of violence. If the District Court holds that the injunction cannot stand based on the remaining four counts, then there will be no need for this Court to consider the meaning of the Hobbs Act or RICO. Put another way, if an injunction cannot rest on the remaining four counts, anything this Court says about the Hobbs Act or RICO would be an unnecessary advisory opinion as to the meaning of federal law. *See Flast v. Cohen*, 392 U.S. 83, 96-97 (1968) ("the implicit policies embodied in Article III . . . impose the rule against advisory opinions.") The Seventh Circuit was correct, then, in concluding that the appropriate course was for the District Court to decide how to handle the four counts of the jury verdict that were not addressed by this Court.

II. THE HOBBS ACT PROHIBITS PHYSICAL VIOLENCE AND THREATS OF PHYSICAL VIOLENCE INTENDED TO INTERFERE WITH INTERSTATE COMMERCE.

A. The Plain Language Of the Hobbs Act Is Clear And Must Be Followed.

The most basic rule of statutory construction, repeatedly invoked by this Court, is that the plain language of a statute must be followed. As this Court explained: "If the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); *see also United States v. Ron Pair Enter, Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of the legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters.").

The plain meaning of the Hobbs Act is clear. It states:

> "Whoever in any way or degree obstructs, delays, or affects commerce or movement of any article or commodity in commerce, by robbery or extortion, or attempts or conspires so to do, *or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section* shall be fined under this title or imprisoned not more than twenty years, or both."

18 U.S.C. §1951(a) (emphasis added). The statute thus prohibits three separate activities that interfere with interstate commerce: 1) robbery (and attempts or conspiracies to commit robbery), or 2) extortion (and attempts and conspiracies to commit extortion), or 3) violence and threats of violence (that are part of a plan to obstruct commerce). Indeed, this Court has expressly recognized this and declared: "[The Hobbs] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, *or physical violence*." *United States v. Stirone*, 361 U.S. 212, 215 (1960) (emphasis added); *see also United States v. Culbert*, 435 U.S. 371, 373 (1978) (quoting *Stirone*).

The plain language of the Hobbs Act prohibits physical violence and threats of physical violence designed to interfere with interstate commerce without any link to

robbery or extortion. For years, the United States government relied on this interpretation in bringing prosecutions under the Act. *See United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999); *United States v. Franks*, 511 F.2d 25 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975). It is the newly minted interpretation of the statute that is at odds with the statute's plain meaning.

Contrary to Petitioners' assertion, this Court never has suggested that the statute's clear prohibition of violence and threats of violence applies only when there is extortion or robbery. *See, e.g.*, Scheidler Br. at 28 (arguing that *United States v. Enmons*, 410 U.S. 396 (1973), and *NOW II* held that the Hobbs Act applies only to extortion and robbery). Both *Enmons* and *NOW II* were entirely about the meaning of "extortion" within the Hobbs Act. *Enmons*, for example, concluded that extortion requires "obtaining of property of another" through wrongful means. 410 U.S. at 399. *Enmons* did not discuss whether the Hobbs Act prohibits violence and threats of violence interfering with interstate commerce in the absence of robbery or extortion. *NOW II* similarly held that extortion requires that the person engaged in extortion seek to receive a tangible benefit. Neither case considered, let alone resolved, whether the Hobbs Act prohibits physical violence and threats of violence in interstate commerce without extortion or robbery.

Accepting Petitioners' interpretation of the Hobbs Act would render key parts of the statute's language superfluous. This Court has explained that it is "the cardinal principle of statutory construction . . . that it is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section." *Bennett v. Spear*, 520 U.S. at 173. For example, Petitioners'

argument, that the statute prohibits only extortion and robbery, deprives the word "or" in the statute of any meaning. The statute says: "*or* commits or threatens violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. §1951(a). This Court has stressed that the word "or" must be given its plain, disjunctive meaning. In *Reiter v. Sonotone Corp.*, 422 U.S. 330, 339 (1979), this Court explained: "In construing a statute we are obliged to give effect, if possible to every word Congress used. Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not." Similarly, in *Federal Communication Commission v. Pacifica Foundation*, 438 U.S. 726, 739-40 (1978), this Court explained: "The words 'obscene, indecent, or profane' are written in the disjunctive, implying that each has a separate meaning."

Likewise, here, the statute prohibits extortion *or* robbery *or* violence and threats of violence that obstruct interstate commerce. If violence and threats of violence are prohibited only when there is extortion or robbery, as Petitioners urge, the word "or" would be deprived of all meaning. Petitioners' interpretation of the statute would be plausible only if Congress said: "Whoever . . . affects commerce . . . by robbery or extortion, or attempts to do so by committing or threatening violence to any person or property, shall be fined . . . or imprisoned." But that is not what Congress prohibited. Equally important, the prohibition of violence and threats of violence obstructing interstate commerce would be rendered meaningless if the Hobbs Act were read to prohibit only extortion and robbery.

Petitioners' reading of the language is also inconsistent with what Congress would have thought its chosen language meant in 1948 when it enacted the current version of the provision. At the time the Hobbs Act was adopted, it was recognized that the definition of extortion already included obtaining property from another "by wrongful use of actual or threatened force, violence or fear." The 1939 Black's Law Dictionary defines extortion as "[t]he taking of property from another, with his consent, *induced by wrong use of force or fear, or under color of official right.*" (emphasis added). In fact, the Hobbs Act itself defines extortion as including violence and threats of violence. Section 1951(b)(3) specifies that extortion must involve "induce[ment] by wrong use of actual or threatened force, violence, or fear." Robbery is defined as "the unlawful taking or obtaining of property from the person . . . against his will, by means of *actual or threatened force, or violence, or fear of injury,* immediate or future, to his person or property." 18 U.S.C. §1951(b)(1) (emphasis added). There would be no reason for the statute to include the clause prohibiting violence and threats of violence if it did not mean to make that a separate offense since those requirements are explicitly in the definition of extortion and robbery. *See* Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129, 142-143 (1994).

Under their interpretation, Petitioners have to stretch to come up with some meaning for the clause prohibiting "physical violence" or threats of violence. Scheidler Br. at 34-35; Operation Rescue Br. at 13; United States Br. at 11. They have tried to imagine cases in which "physical violence" would cover individuals who were acting in furtherance of a plan to commit robbery or extortion, but

whose acts do not already fall within the definition of robbery, extortion, or attempts or conspiracies to extort or rob. They focus on "attempts" as such situations. Scheidler Br. at 34-35; Operation Rescue Br. at 13; United States Br. at 11. But anyone who commits physical violence to a person or property in furtherance of a plan of robbery or extortion is guilty of attempting one of those crimes, or if others are involved, of conspiring to commit one or the other. By the time a person commits or threatens violence, he or she has taken a sufficient step to be guilty of attempt.

Operation Rescue offers the example of the "subordinate 'enforcer' who, while not himself extorting anything, harms people or property when the extortionist does not obtain the desired payment from the victim." Operation Rescue Br. at 13 n.9. But such a subordinate enforcer would be guilty either as a conspirator under the Act's prohibition of conspiracy, or guilty as an accomplice. *See* 18 U.S.C. §2. Another example the United States offers is where the "government has insufficient proof of an attempt or a conspiracy." United States Br. at 11. But this is not plausible: without evidence of conspiracy or attempt, there likely would not be evidence that the violence was in furtherance of a plan to commit robbery or extortion. At the very least, as the Court of Appeals noted, "It seems unlikely that Congress included the 'violence' language to capture such a tiny set of academic hypotheticals." 396 F.3d at 816. *See also* Bradley, *supra*, at 142-43 ("[The Hobbs Act] may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion. But this interpretation makes no sense! Robbery and extortion frequently involve the commission (robbery) or threat (extortion) of violence. . . .

Moreover, the 'robbery and extortion' clauses also forbid 'attempts' and conspiracies. Thus, under this reading, the 'physical violence' clause would be less inclusive, and hence would add nothing, to the preceding 'robbery' and 'extortion' clauses. One who commits violence in furtherance of a plan to commit robbery or extortion has either committed, attempted to commit, or conspired to commit robbery or extortion and thus has violated the first clause, rendering the third clause nugatory.")

Petitioners argue that the statute prohibits only extortion or robbery because it punishes those who commit or threaten "physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section*." Operation Rescue Br. at 12; Scheidler Br. at 22-23. Petitioners read the italicized language to refer to robbery or extortion. The only sensible reading of this language, however, is that it simply means that the statute is prohibiting physical violence and threats of physical violence that further a plan to obstruct interstate commerce. To adopt Petitioners' construction renders the word "or" and the prohibition of "physical violence" and threats of violence entirely superfluous. This would violate this Court's "duty to give effect, if possible to every clause and word of a sentence." *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

Moreover, the title of the Hobbs Act makes clear that the last phrase, which Petitioners focus on, is a prohibition of physical violence and threats of physical violence in interstate commerce, not a limitation of the statute to extortion or robbery. Congress titled the statute, "Interference with commerce by threats or violence." Considering

the Act's title is a traditional means of statutory construction. The designation given to a statute by the legislature "has a communicative function" and is considered a valuable "intrinsic" aid to statutory meaning. 2A Norman Singer, Statutes and Statutory Construction §47.03 at 214 (6th ed. 2000). Chief Justice John Marshall's view, that "[t]he title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature," *United States v. Palmer*, 16 U.S. 610, 631 (1818), has been reaffirmed many times by this Court. In the famous statutory construction case, *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 462 (1892), the Court said "[a]mong other things which may be considered in determining the intent of the legislature is the title of the act." Recently, in *Almendarez-Torres v. United States*, 523 U.S. 224, 233 (1998), the Court affirmed that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *See also Immigration and Naturalization Serv. v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text"); *United States v. Oregon & C.R. Co.*, 164 U.S. 526, 536 (1896) ("if it can be said that the words of the statute admit of any reasonable doubt as to their meaning or application, it is clearly proper that the title of the act be considered in determining the intent of Congress.")

The title of the 1948 revision of the Hobbs Act clearly states the scope of the Act. The Act is directed, as the title says, at "Interference with commerce by threats or violence." The wording of the title was a very conscious choice by the revisers. Because the original Hobbs Act was enacted, in 1946, as an amendment to Anti-Racketeering

Act of 1934, 48 Stat. 979 (1934), codified at 18 U.S.C. §§420a-420e (1940 ed.), it carried forward the title of the earlier statute: "An Act to protect trade and commerce against interference by violence, threats, coercion, or intimidation." *See* 60 Stat. 420 (1946). The Anti-Racketeering Act of 1934, "which was the predecessor to the Hobbs Act, targeted, as its name suggests, racketeering activities that affected interstate commerce, including both extortion and coercion." *NOW II*, 537 U.S. at 405.

The 1948 revisers understood that the Hobbs Act did not extend to mere "coercion" or "intimidation" and they omitted those terms from the statute's title. *See* 62 Stat. 793 (1948). The obvious implication is that the revisers understood the revised statute to "target" what its title says: threats and violence that interfere with commerce. Congress, in enacting the revised statute with the new title set out in the text of the law – "Interference with commerce by threats or violence" – ratified this understanding. *See* 62 Stat. 793 (1948); 1 U.S.C. §204(a).

Petitioners' strained interpretation of "in furtherance of a plan or purpose to do anything in violation of this section" also ignores the obvious and intentional difference between this language and the one clause of §1951(a) that does explicitly refer back to robbery and extortion. Attempts and conspiracies are specifically tied to the preceding robbery and extortion clause by the phrase "so to do." Had Congress intended to similarly limit the violence clause, it could simply have used the same language, stating "or commits or threatens physical violence to any person or property in furtherance of a plan or purpose so to do." Congress intentionally did not adopt this parallel construction, however, and instead chose a phrase that referred broadly to the section as a whole. Petitioners'

attempt to impose identical meanings on these very different clauses should be rejected as contrary to the plain meaning of the text. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.")

Petitioners place great weight on the Advisory Note which says that Congress did not mean to make substantive changes in the Hobbs Act in reenacting it in 1948. Scheidler Br. at 24. But this Advisory Note cannot take precedence over the literal language of the statute. This Court on other occasions has expressly recognized that Reviser's Notes are not authoritative and are frequently wrong. *See, e.g., United States v. Wells*, 519 U.S. 482, 497 (1997) ("the revisers' assumption that the consolidation made no substantive change was simply wrong. . . . Those who write revisers' notes have proven fallible before. *See State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 532, n.11 (1967).")[6]

In 1994, Congress amended the Hobbs Act. P.L. 103-322, 108 Stat. 2147. In that Amendment, Congress changed some of the language of subsection (a), but not any other sections of the law. When Congress enacted that change, it knew that the Hobbs Act was being used against violence and threats of violence, apart from extortion and

---

[6] There are other instances where the legislative history says that there are only stylistic changes, but Congress included important substantive alterations as well. For example, this is what occurred with the Judicial Code, which was recodified at the same time as the Criminal Code, and was changed in a number of substantive respects. *See* William W. Barron, The Judicial Code, 8 F.R.D. 439 (1948-49).

robbery. Congress could have, but did not, revise the language of the statute to limit it to instances of extortion or robbery.

B. There Is No Reason To Reject The Literal Language Of The Hobbs Act.

When the statute's language is clear, as it is here, there is no need to go any further in construing the statute. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.") Petitioners invite this Court to do what it generally declines to do: use legislative history to give a statute a meaning other than the one the plain language dictates. Even if the Court accepts the invitation, none of the arguments offered by Petitioners and their *amici* justify abandoning the literal language of the law.

Petitioners point to the legislative history of the Hobbs Act, which is silent about why violence and threats of violence were added to the statute. The prior version of the Hobbs Act prohibited extortion and robbery, but did not also specifically prohibit violence or threats of violence. Pub. L. No. 486, 60 Stat. 420 (1946). In 1948, Congress approved the present form of the Hobbs Act which prohibits extortion, or robbery, or violence and threats of violence in interstate commerce. Pub. L. No. 772, 62 Stat. 793-94 (1948). Contrary to Petitioners' inference, there is no indication that Congress meant to prohibit only extortion and robbery. Nothing in the legislative history suggests

that violence and threats of violence are prohibited only if occurring during the commission of extortion or robbery. Congress's deliberate choice to change the language explicitly to prohibit violence and threats of violence, in addition to extortion and robbery, must be taken as conclusive evidence of congressional intent to make this a separate offense.

This reading of the statute also is consistent with the legislative history. The 1948 revision, which produced the current language, occurred at a time when Congress was enacting and recodifying federal laws to protect interstate commerce as much as possible. *See, e.g.*, 18 U.S.C. §§1361-1364 (prohibition of interference with communications, foreign commerce, destruction of government property); *see also* Bradley, *supra*, at 142-44. It is quite reasonable to conclude that as part of that process of federal criminal law reform, Congress intended to prohibit violence that obstructed interstate commerce.

The literal language of the statute is especially definitive because Congress approved the revision of the law. In *Continental Casualty Co. v. United States*, 314 U.S. 527, 530 (1942), this Court explained that where Congress has approved a revised statute, the language of the subsequent statute must be given full effect: "The change . . . in the Revised Statutes was made without any explanation of its purpose and indeed without the brackets or italics used to indicate a repeal or amendment. . . . The revised form, however, is to be accepted as correct, notwithstanding a possible discrepancy."

All that can be known of congressional intent is that Congress expressly approved a revision of a statute, entitled "Interference with commerce by threats or violence," to

include a prohibition of violence and threats of violence in addition to the existing language prohibiting only extortion and robbery. Congress realized that the Hobbs Act as previously written applied only to extortion or robbery and not other, even more serious heinous and often fatal acts of violence, such as murder or arson in interstate commerce. So as to clarify this, and be clear that it applied – as the title says – to acts of violence or threats of violence that are "part of a plan or purpose" to obstruct, delay, or affect interstate commerce, the statutory language was changed. *See Ex Parte Collett*, 337 U.S. 55, 61 (1949) ("Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of §1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.")

There is every reason why Congress would want, in addition to prohibiting extortion or robbery, to prohibit physical violence and threats of physical violence that are "in furtherance of a plan or purpose" to obstruct interstate commerce. There could be situations in which individuals threaten or commit acts of physical violence even though they did not seek anything in return and thus did not commit extortion or robbery. For example, individuals could commit physical violence against stores whose products they find immoral. Businesses owned by African-Americans or Jews could be targeted for violence by racist or anti-Semitic bigots. Protestors, or terrorists, could sabotage railroads, shipping, planes, or trucks. In

each of these examples, there would be neither extortion nor robbery, but there would be violence intended to obstruct interstate commerce which Congress understandably would want to prohibit. Violence and threats of violence that further a plan to obstruct interstate commerce have national consequences that are distinct from ordinary criminal acts.

Petitioners and their *amici* argue that following the literal language of the Hobbs Act could lead to undesirable prosecutions and deprive states of authority over criminal matters. *See, e.g.,* Scheidler Br. at 31; Amicus Br. of the State of Alabama, et al., at 10-12. The Hobbs Act, in its present form, has existed for 57 years and this problem has not been manifest. However, if the problem develops, the appropriate recourse is to convince Congress to change the law, not for this Court to negate the literal language of the statute. *See, e.g., Neal v. United States*, 516 U.S. 284, 295 (1996) ("Congress is free to change this Court's interpretation of legislation"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("Congress remains free to alter what we have done."); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977) ("Congress is free to change this Court's interpretation of its legislation.")

The concern over federalism raised in the amicus brief by certain states is without merit. Their concern ignores that the Hobbs Act has a crucial jurisdictional limit: it applies only to extortion, robbery, or physical violence or threats of violence to persons or property that obstruct interstate commerce. 18 U.S.C. §1951(a). Moreover, a defendant must commit the act of violence "in furtherance of a plan or purpose to . . . obstruct, delay, or affect commerce." The defendant must act with the purpose of interfering with interstate commerce. Thus, mugging a

salesperson is not covered, but a national campaign to obstruct access to businesses by violence and threats of violence – exactly what occurred here – is prohibited.[6]

Following the plain language of the Hobbs Act would not in any way adversely affect the activities of labor unions. *See* Amicus Br. of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae. Section 1951(c) is explicit in stating that nothing in the Act is meant to "repeal, modify or affect" the provisions of federal law providing protections to labor unions. Moreover, in *United States v. Enmons*, this Court expressly held that union activities do not constitute extortion. The Court rejected "the theory that the [Hobbs] Act proscribes the use of force to achieve legitimate collective-bargaining demands." 410 U.S. at 407.

Nor does the rule of lenity, urged by Petitioners, provide a reason for this Court to refuse to follow the plain language of the statute. The rule of lenity only applies if the language of the statute is ambiguous. *See Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *Huddleston v. United States*, 415 U.S. 814 (1974); *Callanan v. United States*, 364 U.S. 587 (1961). But as shown above, the Hobbs Act is not at all ambiguous in prohibiting extortion

---

[6] The concern raised by the Pacific Legal Foundation in its Amicus Brief is thus without foundation. Pacific Legal Foundation Br. at 24 ("this interpretation raises serious questions concerning the scope of federal power under the Commerce Clause.") The statute applies only if the conduct "obstructs, delays, or affects commerce or the movement of an article or commodity in commerce." §1951(a). In this case, the evidence clearly and overwhelmingly established that Petitioners were engaged in a concerted nationwide campaign of physical violence against reproductive health facilities with the purpose of obstructing their commerce.

or robbery or physical violence and threats of violence that "furthers a plan to obstruct" interstate commerce.

Petitioners argue that applying the Hobbs Act to violence and threats of violence in interstate commerce would render other statutes, such as the Freedom of Access to Clinics Entrances Act (FACE), unnecessary. Scheidler Br. at 30. Often there are multiple statutes prohibiting the same criminal conduct. *See, e.g., Branch v. Smith*, 538 U.S. 254, 273 (2003); *JEM AG Supply v. Sperber Adams Associates*, 524 U.S. 124, 141-44 (2001). Enactment of a statute that overlaps another is common and not a reason for depriving the Hobbs Act of its plain meaning.

Moreover, a later-enacted statute does not change the meaning of the earlier law, especially as here where the statute's plain language is clear. In *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996), this Court noted: "We add that, in any event, the view of a later Congress cannot control the interpretation of an earlier enacted statute." In other words, interpretation is controlled by the language of the statute being applied and not the later law. Ronald Benton Brown and Sharon Jacobs Brown, Statutory Interpretation: The Search for Legislative Intent 154 (2002).

That is especially true here where Congress, in enacting FACE, sought to make it easier to obtain a remedy for interfering with reproductive health providers and places of worship. RICO requires a pattern of activity, while FACE provides a remedy after the first act. Moreover, Petitioners' argument, that FACE is a basis for narrowly construing the Hobbs Act, is disingenuous since they continue to challenge the constitutionality of that

law. *See, e.g., United States v. Bird*, 401 F.3d 633 (5th Cir. 2005), *cert. denied*, 2005 WL 150754 (October 3, 2005); *United States v. Gregg*, 226 F.3d 253, *cert. denied*, 532 U.S. 971 (2001); *United States v. Weslin*, 156 F.3d 292, 297-98 (2d Cir. 1998) (*per curiam*), *cert. denied*, 525 U.S. 1071 (1999); *United States v. Wilson*, 154 F.3d 658 (7th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999).

Simply put, this is the classic case where the statute is clear and its language must be followed. The Hobbs Act prohibits extortion or robbery or physical violence and threats of physical violence designed to obstruct interstate commerce.

III. RICO PERMITS PRIVATE LITIGANTS TO SEEK INJUNCTIVE RELIEF.

In asserting that RICO does not authorize private parties to obtain injunctions, Petitioners urge a reading of RICO that does violence to the statute's express terms and is inconsistent with the principle that "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979).

Petitioner Operation Rescue asserts: "This Court appears already to have acknowledged that private injunctive relief is not available under RICO." Operation Rescue Br. at 25. Never has this Court said or implied this. In *NOW II*, this Court granted review on this issue, but concluded its opinion by stating: "We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. §1964." *Scheidler*, 537 U.S. at 411.

A. RICO Expressly Authorizes Injunctive Relief to Private Parties.

As explained above, statutory interpretation begins with a statute's language and where, as here, that language is unambiguous, it ends there. *See Estate of Cowart v. Niklos Drilling Co.*, 505 U.S. 469, 479 (1992). Section 1964(a) unambiguously gives district courts broad power to remedy RICO violations, including the power "to prevent and restrain violations of section 1962" and to "impos[e] reasonable restrictions on the future activities" of statute violators.[7] Nothing could be a clearer authorization of the power to issue injunctions than this statement.

Petitioners nevertheless assert that §1964(a) addresses only standing. Their argument ignores two other sub-sections of §1964: standing is conferred in §1964(b) for the United States and in §1964(c) for private parties whose business or property is injured by RICO violations. Nothing in either §1964(b) or §1964(c) precludes the United States or private parties from seeking equitable remedies under §1964(a). The most logical reading of these three sub-sections is that (a) authorizes remedies, while (b) and (c) specify which parties have standing to seek them.

---

[7] The Seventh Circuit correctly rejected Petitioner Scheidler's argument (Scheidler Br. at 42) that §1964(a) is "purely jurisdictional." Section 1964(a) "grant[s] district courts authority to hear RICO claims and then spells out a non-exclusive list of the remedies district courts are empowered to provide in such cases." SPA 9a. Even Operation Rescue says (Operation Rescue Br. at 19-20) that §1964(a) both "confers jurisdiction and authorizes certain remedies." Because §1964(a) identifies remedies, it cannot be "purely jurisdictional." The Seventh Circuit's ruling comports with this Court's jurisprudence. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) ("jurisdiction" refers to the court's "power to declare the law," not to remedies or standing).

Because RICO's text plainly authorizes injunctive relief to private parties, Petitioners are forced to argue (Operation Rescue Br. 33-34; Scheidler Br. at 43) that a limitation on the powers of federal courts should be implied. According to Petitioners, since the government is authorized to seek interim injunctive relief under §1964(b), the absence of an express reference to equitable relief for private plaintiffs in §1964(c) precludes private-party injunctions. Nothing in §1964(b) states or implies, however, that §1964(a) is restricted to the government. That §1964(b) authorizes the Attorney General to seek temporary relief is not evidence that only the Attorney General is permitted to seek permanent forms of relief. Indeed, if the availability of injunctive relief were determined by reference to Section 1964(b), Section 1964(a) would be superfluous, and "courts should disfavor interpretations of statutes that render language superfluous." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992).

Similarly, §1964(c) does not indicate that treble damages are a private plaintiff's exclusive remedy.* As the Seventh Circuit reasoned, because the government's authority to seek permanent injunctions stems from the combination of the grant of a right of action in §1964(b) and the grant of authority for courts to enter injunctions in §1964(a), there is "no reason not to conclude, by parity of reasoning, that private parties can also seek injunctions

---

* Entitlement to attorneys' fees and treble damages are specified in the law because they are extraordinary and would not exist without specific statutory authorization. But federal courts inherently have authority to issue injunctive relief unless a statute expressly eliminates this power.

under the combination of grants in §§1964(a) and (c)." *NOW II*, 267 F.3d at 697. Petitioners claim (Operation Rescue Br. at 20; Scheidler Br. at 42-43) that because §1964(b) says the Attorney General "may institute proceedings," while §1964(c) says private plaintiffs "may sue," only the Attorney General can seek permanent injunctive relief. But this conclusion does not follow. As the Seventh Circuit found, these phases are "equivalent" 267 F.3d at 697, and both allow parties with standing to use §1964(a) to seek injunctions.

In addition, federal courts are "presum[ed]" to retain all of the equitable powers conferred by the Judiciary Act of 1789, 1 Stat. 73, 78, unless a statute clearly denies such equitable relief. This Court has long required the "clearest command" from Congress before federal courts can be stripped of their equitable powers. *Califano*, 442 U.S. at 705; *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992) ("[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.")

Not even Petitioners contend that RICO explicitly denies injunctive relief to private parties. Rather, Petitioners contend that RICO strips courts of the power to issue injunctions by implication. There is no basis for inferring this preclusion. On the contrary, Congress enacted RICO with the understanding that the courts of law and equity had merged, broadly enabling courts, in their discretion, to award equitable relief as a remedy for injured parties with standing. *See Grupo Mexicano v. Alliance Bond Fund*, 527 U.S. 308, 318-19 (1999). Moreover, RICO expressly provides that its stated remedies are not intended to supersede any additional civil remedies

available by virtue of other provisions of law. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, §904(b), 84 Stat. 922, 947.

The injunctive remedy is particularly important because RICO addresses ongoing criminal enterprises that in many cases, as here, commit open-ended pattern crimes. In addition, in class actions such as this one, "injunctions may be necessary to protect the interests of absent class members and to prevent repetitive litigation." *Califano*, 442 U.S. at 705.

The Seventh Circuit's ruling is also faithful to the statutory mandate that RICO "be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, §904(a), 84 Stat. 922, 947 (1970). RICO's liberal-construction clause – a rarity in criminal statutes – was included to ensure that "Congress' intent is not frustrated by an overly narrow reading of the statute." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). This Court consistently has rejected interpretations that would unduly limit RICO's scope. *See, e.g., Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165 (2001); *Salinas v. United States*, 522 U.S. 52, 61-66 (1997); *NOW I*, 510 U.S. at 256-62; *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236-37 (1989); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985). This Court has stressed that "the statute's remedial purposes are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Sedima*, 473 U.S. at 498.

B. RICO Does Not Strip Courts of Equitable Powers By Implication.

Petitioners argue that the interpretation of § 1964(a) is controlled by two old antitrust cases, which they say establish that any statute authorizing treble damages implicitly strips courts of the power to issue injunctions. Operation Rescue Br. at 22-23; Scheidler Br. at 38-39. This argument reads part of the antitrust laws out of context, contradicts a plain reading of the RICO statute, ignores crucial differences between the antitrust laws and RICO, and disregards the many federal statutes that, like RICO, authorize both treble damages and injunctive relief.

Neither *Minnesota v. Northern Securities Co.*, 194 U.S. 48 (1904), nor *Paine Lumber Co. v. Neal*, 244 U.S. 459 (1917), held that the treble damages provision of the Sherman Act excluded private injunctive relief. Neither case rested on the Sherman Act treble damages provision; rather, both turned on standing. *See Northern Sec.*, 194 U.S. at 70 (plaintiff had no standing because it lacked antitrust injury); *Paine Lumber*, 244 U.S. at 471 (same). The Court's decision in both cases hinged on §4 of the Sherman Act, which provides that: "[I]t shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations." Because §4 made it the government's express duty to sue for injunctions, the Court concluded that Congress did not intend private parties to do the same.

In marked contrast to §4 of the Sherman Act, RICO's permanent-injunctions section, §1964(a), does not mention any particular party; it directly grants power to issue

injunctions to the federal courts without restriction as to party. If permanent-injunction language had been included in §1964(b), which mentions only the government, or if the same governmental-duty language in Sherman §4 had been included in §1964(a), Petitioners would have a stronger argument. But RICO's remedies section was not written that way. The important textual differences between Sherman §4 and RICO §1964(a) show that *Paine Lumber* and *Northern Securities*, both decided before the merger of law and equity, have no application. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 459 (1977).

Like the Sherman Act, the Clayton Act contains major structural differences from §1964. Section 15 of the Clayton Act, 38 Stat. 730, 736-37 (1914), 15 U.S.C. §25, is almost identical to §4 of the Sherman Act, expressly imposing a duty on the government to "institute proceedings in equity to prevent and restrain" violations; RICO's §1964(a) has no such governmental duty clause. Because §1964(a) is not limited to any particular party, it was unnecessary for Congress to address private injunctive relief separately, as it was in the Clayton Act, where §15 contains the government's "duty" language. 15 U.S.C. §26.

In fact, Congress deliberately drafted RICO separate from the antitrust laws to avoid antitrust precedent on matters such as standing and causation. *See Sedima*, 473 U.S. at 498. As a result, this Court often has rejected the antitrust analogy when analyzing RICO. *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 460 (1990); *Sedima*, 473 U.S. at 498. Where, as here, the language and structure of the antitrust laws significantly differ from that of RICO, those laws provide no meaningful guidance.

C. RICO's Legislative History Does Not Support Petitioners.

Petitioners' examination of the legislative history of RICO (Operation Rescue Br. at 26-29; Scheidler Br. at 45-48) ignores this Court's admonition that it is the language of RICO itself that provides "the most reliable evidence of [congressional] intent." *United States v. Turkette*, 452 U.S. 576, 593 (1981). This Court consistently has held that only the "most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70, 75 (1984); *see also*, *Salinas v. United States*, 522 U.S. at 57. But even if there were some ambiguity in RICO, Petitioners cannot satisfy the high burden of establishing clear congressional intent to limit the federal courts' inherent power to grant injunctions.

Petitioners urge two particularly unreliable uses of legislative history. First, Petitioners suggest, relying largely on *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), that because Congress did not enact a proposal that would have separately provided for private injunctions, the broad statutory grant of equitable power in §1964(a) should be restricted to the government. Operation Rescue Br. at 27-28; Scheidler Br. at 46-48. This argument is based on the erroneous notion that Congress was repeatedly presented with the opportunity to permit private plaintiffs to seek injunctions and repeatedly rejected it.

In fact, Congress never rejected a provision specifically authorizing private injunctions. In RICO's floor debate, Representative Steiger offered an amendment addressing a number of RICO's provisions, including the

amount in controversy, intervention by the Attorney General, statute of limitations, damage remedies for the government, and private injunctions. *See* 116 Cong. Rec. 35,346 (1970). "The proposal was greeted with some hostility because it had not been reviewed in Committee, and Steiger withdrew it without a vote being taken." *Sedima*, 473 U.S. at 487-88. The Judiciary Committee members had agreed to oppose all floor amendments, which makes the withdrawal of this one inconsequential. G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO,* 62 Notre Dame L. Rev. 526, 550 n.103 (1987). Petitioners neglect to mention what Representative Steiger himself said about the bill: "[T]he bill as it now stands . . . may have this option [of equitable relief]." 116 Cong. Rec. 35,347 (1970).

After RICO became law, a similar amendment affecting multiple provisions was introduced. 117 Cong. Rec. 46,386, 46,393 (1971). The Senate Judiciary Committee reported favorably on the bill, and it passed the Senate without a single vote against it, 118 Cong. Rec. 29,368-69, 29,379 (1972); but the bill was never voted on by the House, 119 Cong. Rec. 10,317 (1973).

The fact that RICO's sponsors asked that an amendment affecting many of RICO's provisions be withdrawn without a vote, or that the same bill was later approved without opposition by the Senate but not voted on by the House, says nothing about congressional intent regarding the particular proposed provision relating to private equitable relief. *See United States v. Craft*, 535 U.S. 274, 287 (2002) (congressional inaction lacks significance because many inferences may be drawn from inaction). Failure to pass a bill that would have amended several of RICO's provisions may be explained by many reasons,

including opposition to some other portion of the amendment or the belief that such a provision was redundant. This Court's decisions make clear that this type of legislative history is equivocal at best. It surely is not the requisite "clearly expressed legislative intent" that Petitioners must show to trump both RICO's text and the federal courts' inherent power.

Petitioners' second legislative history argument is equally unavailing. They contend that because the Senate initially passed RICO without §1964(c)'s treble damages provision, §1964(c) must be read in a vacuum, as if §1964(a) were not part of the statute. Operation Rescue Br. at 26-27. In essence, Petitioners argue that the meaning of §1964(a) was frozen in time at a point when the bill had no application to private parties. When Congress granted private parties standing, it made no effort to change the language of §1964(a) to limit its reach only to the government. The plain language of the statute as amended authorizes private parties to seek the relief authorized in the subsections that already existed.

D. Private Injunctions Serve RICO's Express Purposes.

An express purpose of RICO is to eradicate crime in the United States "by establishing new penal provisions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Pub. L. 91-452, 84 Stat. 922, 922-23 (1970). Congress aimed not only at the mafia, but at any group who, like Petitioners, engage in a widespread and organized pattern of violence and threats. Congress created RICO's civil remedies to encourage private plaintiffs "to fill

prosecutorial gaps," *Sedima*, 473 U.S. at 493, and to turn victims "into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity," *Rotella v. Wood*, 528 U.S. 549, 557 (2000). And where racketeers who injure private businesses are judgment-proof, as Petitioners claim to be, e.g., PX 1503, the threat of damages alone has no deterrent effect. Thus, private injunctive relief is essential to effectuate RICO's purpose.

This Court should decline Petitioners' invitation (*see, e.g.*, Scheidler Br. at 48-50) to add an unwritten restriction to RICO on policy grounds. Neither Petitioners nor their *amici* point to a single instance in which a federal court has had any difficulty exercising equitable discretion in a private-plaintiff antitrust case, a power that antitrust laws have long allowed. *See, e.g., Blue Cross v. Marshfield Clinic*, 152 F.3d 588 (7th Cir. 1998) (noting that equitable relief is often available in antitrust cases when damages are not).

Petitioners' argument also ignores the statutory limits on a court's power to issue equitable relief. Section 1964(c) provides that persons injured in their business or property by reason of a violation of §1962 "may sue therefor." This language requires that there be a direct nexus between the injury to business or property and any equitable relief awarded.

After a full trial on the merits, the district court concluded that Petitioners have "a history of unlawful conduct," including repeated acts of violence and threats of violence against Respondents and other persons and business entities across the United States. SPA 133a. Based on the need to protect Respondents and the public from ongoing crime, it issued a permanent injunction to

prevent future violence. Such relief serves the very core of RICO's purposes, and this Court should decline Petitioners' invitation to limit artificially RICO's equitable remedies.

CONCLUSION

For all of these reasons, the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
Duke University School of Law
Science Drive & Towerview Rd.
Durham, North Carolina 27708
(919) 613-7173

PAUL HOFFMAN
SCHONBRUN DESIMONE
SEPLOW HARRIS & HOFFMAN
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

LAURIE LEVENSON
Loyola Law School
919 S. Albany Street
Los Angeles, California 90015
(213) 736-1149

CATHERINE FISK
Duke University School of Law
Science Drive & Towerview Rd.
Durham, North Carolina 27707
(919) 613-7196

FAY CLAYTON
ADAM HIRSCH
ROBINSON, CURLEY
& CLAYTON, P.C.
300 S. Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

LOWELL E. SACHNOFF
JACK L. BLOCK
CASEY WESTOVER
SACHNOFF & WEAVER, LTD.
10 S. Wacker Drive
Chicago, Illinois 60606
(312) 207-1000

FRANK SUSMAN
101 South Hanley,
Ste. #1700
St. Louis, Missouri 63105
(314) 615-6000

Attorneys for Respondents

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SCHEIDLER ET AL. *v.* NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 04–1244. Argued November 30, 2005—Decided February 28, 2006*

Respondents, a national nonprofit organization that supports the legal availability of abortions and two health care clinics that perform abortions, filed a class action alleging that petitioners, individuals and organizations that oppose legal abortion, engaged in a nationwide conspiracy to shut down abortion clinics through violence and other unlawful acts. Arguing that petitioners' activities amounted in context to extortionate acts that created a pattern of racketeering activity, respondents based their claims on, *inter alia*, the Hobbs Act, which makes it a federal crime to "obstruc[t], dela[y], or affec[t] commerce . . . by . . . robbery or extortion . . . or commit[ting] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." 18 U. S. C. §1951(a), and on the Racketeer Influenced and Corrupt Organizations Act (RICO), which defines a proscribed "pattern of racketeering activity," §1962(a), in terms of certain predicate acts that include extortion, see §1961(1). After trial, the jury concluded that petitioners violated RICO's civil provisions, the Hobbs Act, and other extortion-related laws. In *Scheidler* v. *National Organization for Women, Inc.*, 537 U. S. 393 *(NOW II)*, this Court reversed the Seventh Circuit's affirmance of the jury's award of damages and the District Court's issuance of a permanent nationwide injunction. The Court noted that the Hobbs Act defines "extortion" as necessarily including the improper " 'obtaining of property from another,' " *id.*, at 400

*Together with No. 04–1352, *Operation Rescue* v. *National Organization for Women, Inc., et al.*, also on certiorari to the same court.

(quoting §1951(b)(2)); observed that the claimed "property" here consisted of a woman's right to seek clinic services and the rights of clinic staff to perform their jobs and of clinics to provide care free from wrongful threats, violence, coercion, and fear, *id.*, at 400–401; decided that characterizing petitioners' actions as an "obtaining of property from" respondents went well beyond permissible boundaries, *id.*, at 402; and held, therefore, that petitioners did not commit extortion as defined by the Hobbs Act, *id.*, at 397. The Court concluded that, because all of the predicate acts supporting the jury's finding of a RICO violation had to be reversed, the judgment that petitioners violated RICO must also be reversed, *id.*, at 411. On remand, the Court of Appeals decided that, because this Court had not considered respondents' alternative theory that the jury's RICO verdict rested not only on extortion-related conduct, but also on four instances (or threats) of physical violence *unrelated* to extortion, the cases must be remanded to the District Court to determine whether these four acts alone might constitute Hobbs Act violations (sufficient, as predicate acts under RICO, to support the injunction).

Held: Physical violence unrelated to robbery or extortion falls outside the Hobbs Act's scope. Congress did not intend to create a freestanding physical violence offense. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the Act refers to as robbery or extortion (and related attempts or conspiracies). Pp. 5–11.

(a) The more restrictive reading of the statutory text—the one tying the prohibited violence to robbery or extortion—is correct. For one thing, it is the more natural reading. The text preceding the physical violence clause does not forbid *obstructing, delaying, or affecting commerce;* rather, it forbids *obstructing, delaying, or affecting commerce "by robbery or extortion."* §1951(a) (emphasis added). This means that behavior that obstructs, delays, or affects commerce is a "violation" of the statute only if it also involves robbery or extortion (or related attempts or conspiracies). Consequently, the reference in the physical violence clause to actions or threats of violence "in furtherance of a plan or purpose *to do anything in violation of this section*" seems to mean acts or threats of violence in furtherance of a plan or purpose *to engage in robbery or extortion*, for that is the only kind of behavior that the section otherwise makes a violation. This restrictive reading is further supported by the fact that Congress often intends such statutory terms as "affect commerce" or "in commerce" to be read as terms of art connecting the congressional exercise of legislative authority with the constitutional provision (here, the Commerce Clause) granting that authority. See, *e.g.*, *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 273. Such jurisdic-

tional language may limit, but it will not primarily define, the behavior that the statute calls a "violation" of federal law. Cf. *Jones* v. *United States*, 529 U. S. 848, 854. Moreover, the statute's history supports the more restrictive reading: Both of the Hobbs Act's predecessor statutes made clear that the physical violence they prohibited was not violence in furtherance of a plan to injure commerce, but violence in furtherance of a plan to injure commerce through coercion or extortion (1934 Act) or through extortion or robbery (1946 Act). The Hobbs Act's legislative history contains nothing to the contrary. That the present statutory language is less clear than the 1946 version does not reflect a congressional effort to redefine the crime. To the contrary, Congress revised the Act's language in 1948 as part of its general revision of the Criminal Code, which "was not intended to create new crimes but to recodify those then in existence." *Morissette* v. *United States*, 342 U. S. 246, 269, n. 28. The Court will not presume the revision worked a change in the underlying substantive law absent a clearly expressed intent to do so. *Keene Corp.* v. *United States*, 508 U. S. 200, 209. Here there is no evidence of any such intent. Finally, respondents' interpretation broadens the Hobbs Act's scope well beyond what case law has assumed. It would federalize much ordinary criminal behavior, ranging from simple assault to murder, that typically is the subject of state, not federal, prosecution. Congress did not intend the Hobbs Act to have so broad a reach. See, *e.g.*, *NOW II*, *supra*, at 405. Other Courts of Appeals have rejected respondents' construction of the Act. And in 1994, Congress enacted the Freedom of Access to Clinic Entrances Act, 18 U. S. C. §248(a)(3), which was aimed specifically at the type of activity at issue in this litigation, thereby suggesting that Congress did not believe that the Hobbs Act already addressed that activity. Pp. 5–9.

(b) Respondents' reliance on the canon of statutory construction favoring interpretations that give a function to each word in a statute, thereby avoiding linguistic superfluity, is misplaced. They claim that, because the definitions of robbery or extortion (or related attempts or conspiracies) already encompass robbery or extortion that take place through acts of violence (or related threats), see §§1951(b)(1) and (2), there would be no reason for §1951(a) to contain its physical violence clause unless Congress intended to create a free-standing offense. Petitioners, however, have found a small amount of additional work for the clause to do. The Scheidler petitioners point to a hypothetical mobster who threatens violence and demands payment from a business. Those threats constitute attempted extortion; but the subsequent acts of violence against a noncomplying business by the mobster's subordinates might not constitute attempted extortion or be punishable as a conspiracy to commit extortion if the sub-

Syllabus

ordinates were not privy to the mobster's plan, absent the specific prohibition of physical violence in furtherance of a plan to commit extortion. The Government adds that the clause permits prosecutors to bring multiple charges for the same conduct; *e.g.*, a robber who injured bystanders could be charged with the separate Hobbs Act crimes of robbery and of using violence in furtherance of the robbery. While this additional work is concededly small, Congress' intent is clear. Interpretive canons are designed to help courts determine what Congress intended, not to lead them to interpret the law contrary to that intent. Pp. 9–11.

91 Fed. Appx. 510, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which all other Members joined, except ALITO, J., who took no part in the consideration or decision of the cases.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 04–1244 and 04–1352

JOSEPH SCHEIDLER, ET AL., PETITIONERS
04–1244 *v.*
NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

OPERATION RESCUE, PETITIONER
04–1352 *v.*
NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February 28, 2006]

JUSTICE BREYER delivered the opinion of the Court.

A section of Title 18 of the United States Code (called the Hobbs Act) says that an individual commits a federal crime if he or she "obstructs, delays, or affects commerce" by (1) "robbery," (2) "extortion," or (3) "commit[ting] or threaten[ing] *physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.*" §1951(a) (emphasis added). The dispute in these cases concerns the meaning of the underscored words, in particular the words, "in furtherance of a plan or purpose to do anything in violation of this section." Does this phrase refer to (violence committed pursuant to) those plans or purposes that affect interstate commerce *through robbery or extortion*? Or does it refer to (violence committed pursuant to) those plans or purposes that affect interstate commerce, plain and simple? If the former, the

statute governs only a limited subset of violent behavior, namely, behavior connected with robbery and extortion. If the latter, the statute governs a far broader range of human activity, namely, all violent actions (against persons or property) that affect interstate commerce. In our view, the former, more restrictive reading of the Act is the correct interpretation.

I

Petitioners are individuals (and organizations) who engage in pro-life, anti-abortion protest activities. Respondents are health care clinics that perform abortions and a pro-choice national nonprofit organization that supports the legal availability of abortions. In 1986, (pro-choice) respondents, believing that (pro-life) petitioners had tried to disrupt activities at health care clinics that perform abortions through violence and various other unlawful activities, brought this legal action, which sought damages and an injunction forbidding (pro-life) petitioners from engaging in such activities anywhere in the Nation.

Respondents based their legal claims upon the Hobbs Act, certain other laws that forbid extortion, and a federal antiracketeering statute, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §1962. Respondents argued that petitioners' clinic-related protest activities amounted in context to extortion. They added that these extortionate acts created a "pattern of racketeering activity"—a pattern that RICO defines in terms of certain predicate acts that include acts of extortion. See §1961(1) (Supp. IH). And they sought a permanent injunction, which they believed RICO authorized. See §1964 (2000 ed.).

Initially, the District Court dismissed their complaint. It concluded that RICO requires proof that the alleged criminal acts were motivated by an economic purpose—a purpose that is lacking here. *National Organization for*

Women, Inc. v. *Scheidler*, 765 F. Supp. 937 (ND Ill. 1991). The Court of Appeals for the Seventh Circuit affirmed. *National Organization for Women, Inc.* v. *Scheidler*, 968 F. 2d 612 (1992). But this Court held that the statute "requires no such economic motive," and therefore reversed the Court of Appeals and remanded the case for further proceedings. *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 252 (1994).

After trial, the jury found that petitioners had engaged in a host of extortionate, or extortion-related, acts. It awarded treble damages to two of the respondents (a matter not at issue here) and the District Court entered a nationwide injunction. See §§1964(a), (c). The Court of Appeals affirmed. 267 F. 3d 687 (2001).

This Court again reversed. *Scheidler* v. *National Organization for Women, Inc.*, 537 U. S. 393 (2003) *(NOW II)*. We noted that the Hobbs Act defines "extortion" as necessarily including the improper "'obtaining of property from another.'" *Id.*, at 400 (quoting §1951(b)(2)). We pointed out that the claimed "property" consisted of "a woman's right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear." 537 U. S., at 400–401 (internal quotation marks omitted). We decided that "[w]hatever the outer boundaries may be, the effort to characterize petitioners' actions here as an 'obtaining of property from' respondents is well beyond them." *Id.*, at 402. Accordingly, we held that "because they did not 'obtain' property from respondents," petitioners "did not commit extortion" as defined by the Hobbs Act. *Id.*, at 397. We found that the state extortion law violations, and other extortion-related violations, were flawed for the same reason and must also be set aside. *Id.*, at 410.

Our opinion concluded:

> "Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." *Id.*, at 411.

On remand, the Court of Appeals did not order the District Court to terminate the cases or to vacate its injunction. Instead, the Court of Appeals considered respondents' argument that the jury's RICO verdict rested not only upon many instances of extortion-related conduct, but also upon four instances (or threats) of physical violence *unrelated* to extortion. 91 Fed. Appx. 510, 512 (2004). The Court of Appeals decided that the parties had not presented this theory to this Court and, as a result, we had no occasion to consider whether these four acts alone might constitute Hobbs Act violations (sufficient, as predicate acts under RICO, to support the nationwide injunction). See *id.*, at 513. The Court of Appeals remanded the cases to the District Court to make that determination. *Ibid.*

Petitioners sought certiorari to review this ruling. We granted the writ to consider the following three questions:

> (1) Whether the Court of Appeals improperly disregarded this Court's mandate in *NOW II* by holding that the injunction issued by the District Court might not need to be vacated;
>
> (2) Whether the Hobbs Act forbids violent conduct unrelated to extortion or robbery; and
>
> (3) Whether RICO authorizes a private party to obtain an injunction.

We now answer the second question. We hold that physical violence unrelated to robbery or extortion falls outside the scope of the Hobbs Act. And since our answer to the second question requires an entry of judgment in petition-

ers' favor, we shall not answer the first or third questions.

II

We first set forth the Hobbs Act's text. The relevant statutory section imposes criminal liability on

> "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section* . . . ." 18 U. S. C. §1951(a) (emphasis added).

The question, as we have said, concerns the meaning of the phrase that modifies the term "physical violence," namely, the words "in furtherance of a plan or purpose to do anything in violation of this section." Do those words refer to violence (1) that furthers a plan or purpose to "affec[t] commerce . . . by robbery or extortion," or to violence (2) that furthers a plan or purpose simply to "affec[t] commerce"? We believe the former, more restrictive, reading of the text—the reading that ties the violence to robbery or extortion—is correct.

For one thing, the language of the statute makes the more restrictive reading the more natural one. The text that precedes the physical violence clause does not forbid *obstructing, delaying, or affecting commerce* (or the movement of any article or commodity in commerce); rather, it forbids *obstructing, delaying, or affecting commerce "by robbery or extortion."* *Ibid.* (emphasis added). This language means that behavior that obstructs, delays, or affects commerce is a "violation" of the statute only if that behavior also involves robbery or extortion (or related attempts or conspiracies). Consequently, the reference in the physical violence clause to actions or threats of vio-

lence "in furtherance of a plan or purpose *to do anything in violation of this section*" (emphasis added) would seem to mean acts or threats of violence in furtherance of a plan or purpose *to engage in robbery or extortion*, for that is the only kind of behavior that the section otherwise makes a violation.

This restrictive reading is further supported by the fact that Congress often intends such statutory terms as "affect commerce" or "in commerce" to be read as terms of art connecting the congressional exercise of legislative authority with the constitutional provision (here, the Commerce Clause) that grants Congress that authority. See *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 273 (1995); *Russell* v. *United States*, 471 U. S. 858, 859 (1985). Such jurisdictional language may limit, but it will not primarily define, the behavior that the statute calls a "violation" of federal law. Cf. *Jones* v. *United States*, 529 U. S. 848, 854 (2000) (holding that by using the term "affecting . . . commerce," "'Congress did not define the crime described in [18 U. S. C.] §844(i) as the explosion of a building whose damage or destruction might affect interstate commerce,'" and noting that the Court must look to other "qualifying language" in the provision to define the offense).

For another thing, the statute's history supports the more restrictive reading. Congress enacted the Hobbs Act's predecessor in 1934. See Anti-Racketeering Act, ch. 569, 48 Stat. 979 (reproduced in Appendix, *infra*). That predecessor Act prohibited coercion and extortion appropriately connected with interstate commerce, and placed these prohibitions in §§2(a) and 2(b), respectively. 48 Stat. 980. The Act went on in §2(c) to impose criminal liability on anyone who, in connection with interstate commerce, "[c]ommits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b)." *Ibid.*; see also *NOW II*, 537 U. S., at 407. The 1934 Act

explicitly linked §2(c), the physical violence subsection, with §§2(a) and 2(b). It thereby made crystal clear that the physical violence that it prohibited was not violence in furtherance of a plan to injure commerce, but violence in furtherance of a plan to injure commerce *through coercion or extortion*.

In 1946, Congress enacted a superseding law, namely, the Hobbs Act. Ch. 537, 60 Stat. 420 (reproduced in Appendix, *infra*). The new law changed the old law in two significant respects: It added robbery while omitting coercion. *NOW II*, *supra*, at 407; see *United States* v. *Culbert*, 435 U. S. 371, 377 (1978) ("The bill that eventually became the Hobbs Act . . . substituted specific prohibitions against robbery and extortion for the Anti-Racketeering Act's language"). The new Act, like the old Act, was absolutely explicit in respect to the point here at issue, the necessary link between physical violence and other crimes (now extortion and robbery).

The 1946 Hobbs Act reads as follows:

> "SEC. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> "SEC. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> "SEC. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> "SEC. 5. Whoever commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of section 2* shall be guilty of a felony." 60 Stat. 420 (emphasis added).

As §2 makes clear, the statute prohibits *robbery* and *extortion*. As §5's reference to §2 makes clear, the statute prohibits violence *only* when that violence furthers a plan or purpose to affect commerce by robbery or extortion. Each of the statute's other sections reflects the same approach; each explicitly refers back to §2's prohibition against robbery and extortion.

The Act's legislative history contains nothing to the contrary. Indeed, the Committee Reports and floor debates emphasized that "the purpose of the bill was 'to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion *as defined in the bill*.'" *Culbert, supra*, at 377 (quoting H. R. Rep. No. 238, 79th Cong., 1st Sess., 9 (1945); emphasis added in *Culbert*); see *Culbert, supra*, at 376–378 (discussing legislative history). They nowhere suggested that Congress intended to make physical violence a freestanding crime.

The present Hobbs Act language is less clear than the 1946 version. But the linguistic changes do not reflect a congressional effort to redefine the crime. To the contrary, Congress revised the Hobbs Act's language in 1948 as part of its general revision of the Criminal Code. That "1948 Revision was not intended to create new crimes but to recodify those then in existence." *Morissette* v. *United States*, 342 U. S. 246, 269, n. 28 (1952). This Court has written that it will "not presume that the revision worked a change in the underlying substantive law 'unless an intent to make such [a] change[e] is clearly expressed.'" *Keene Corp.* v. *United States*, 508 U. S. 200, 209 (1993) (alteration made in *Keene*; quoting *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 227 (1957)). And here there is no evidence of any such intent. Rather, the Reviser's Notes indicate that the linguistic changes to the Hobbs Act simply amount to "changes in phraseology and arrangement necessary to effect consolidation." H. R. Rep. No. 304, 80th

Cong., 1st Sess., A131 (1947).

Finally, respondents' Hobbs Act interpretation broadens the Act's scope well beyond what case law has assumed. It would federalize much ordinary criminal behavior, ranging from simple assault to murder, behavior that typically is the subject of state, not federal, prosecution. Decisions of this Court have assumed that Congress did not intend the Hobbs Act to have so broad a reach. See *NOW II*, 537 U. S., at 405 (noting that the Hobbs Act embodied extortion, which required the obtaining of property, not coercion); *id.*, at 411 (GINSBURG, J., concurring) (coercion, which is not covered by the Hobbs Act, "more accurately describes the nature of petitioners' [non-property-related] actions" (internal quotation marks omitted)); *United States* v. *Enmons*, 410 U. S. 396, 410 (1973) (Hobbs Act does not reach violent activity by union members seeking higher wages because such violence is not extortion and Congress did not intend to "cover all overtly coercive conduct in the course of" a labor dispute).

Not surprisingly, other Courts of Appeals that have considered the question have rejected respondents' construction of the Act. See *United States* v. *Yankowski*, 184 F. 3d 1071 (CA9 1999); *United States* v. *Franks*, 511 F. 2d 25 (CA6 1975). And in 1994, Congress enacted a specific statute aimed directly at the type of abortion clinic violence and other activity at issue in this litigation, thereby suggesting it did not believe that the Hobbs Act already addressed that activity. See Freedom of Access to Clinic Entrances Act, 18 U. S. C. §248(a)(3) (imposing criminal liability on anyone who "intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services").

III

Respondents' contrary claim rests primarily upon a canon of statutory construction that favors interpretations

that give a function to each word in a statute, thereby avoiding linguistic superfluity. See *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute'" (quoting *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883))). They claim that, because the definitions of robbery or extortion (or related attempts or conspiracies) already encompass robbery or extortion that takes place through acts of violence (or related threats), "[t]here would be no reason for the statute to include the clause prohibiting violence and threats of violence" unless Congress intended to create a freestanding offense. Brief for Respondents 25; see 18 U. S. C. §1951(b)(1) (defining "robbery" as the "unlawful taking or obtaining of personal property . . . *by means of actual or threatened force, or violence*" (emphasis added)); §1951(b)(2) (defining "extortion" as "the obtaining of property from another . . . *by wrongful use of actual or threatened force, violence, or fear*" (emphasis added)).

Petitioners, however, have found a small amount of additional work for the words to do. Brief for Petitioners Scheidler et al. 33–36; see also Brief for United States as *Amicus Curiae* 11–12. The Scheidler petitioners point to a hypothetical mobster who threatens violence and demands payment from a business. Those threats constitute attempted extortion; but the subsequent acts of violence against a noncomplying business by the subordinates of that mobster may not constitute attempted extortion and may not be punishable as a conspiracy to commit extortion if the subordinates were not privy to the mobster's plan. A specific prohibition of physical violence in furtherance of a plan to commit extortion would bring the subordinates' behavior within the statute's coverage. The United States adds that the physical violence clause permits prosecutors to bring multiple charges for the same conduct. For instance, the clause would apply to a defendant who injured

bystanders during a robbery, permitting the Government to charge that defendant with the Hobbs Act crime of robbery and the separate Hobbs Act crime of using violence in furtherance of the robbery. Tr. of Oral Arg. 22.

We concede that this additional work is small. But the need for language to cover such instances, or perhaps simply a desire to emphasize the problem of violence, led Congress in the original 1946 version of the Hobbs Act to make clear that the statute prohibited, not all physical violence, but only physical violence in furtherance of *a plan or purpose to engage in robbery or extortion*. See *supra*, at 7–8. And it is similarly clear that Congress intended to carry this view forward into the 1948 recodification. See *supra*, at 8–9. The canons of interpretation cannot lead us to a contrary conclusion. Those canons are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent. *Chickasaw Nation* v. *United States*, 534 U. S. 84, 94 (2001) (noting that "canons are not mandatory rules" but guides "designed to help judges determine the Legislature's intent," and that "other circumstances evidencing congressional intent can overcome their force").

IV

We conclude that Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies). The judgment of the Court of Appeals is reversed, and the cases are remanded for entry of judgment for petitioners.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of these cases.

APPENDIX TO OPINION OF THE COURT

A

The Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979, provided:

"AN ACT

"To protect trade and commerce against interference by violence, threats, coercion, or intimidation.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the term 'trade or commerce', as used herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction.

"SEC. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages of a bona-fide employer to a bona-fide employee; or

"(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

"(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections

(a) or (b); or

"(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

"SEC. 3. (a) As used in this Act the term 'wrongful' means in violation of the criminal laws of the United States or of any State or Territory.

"(b) The terms 'property', 'money', or 'valuable considerations' used herein shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee."

B

Title 1 of The Hobbs Anti-Racketeering Act of 1946, ch. 537, 60 Stat. 420, provided:

"SEC. 1. As used in this title—

"(a) The term 'commerce' means (1) commerce between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce within the District of Columbia or any Territory, and (3) all other commerce over which the United States has jurisdiction; and the term 'Territory' means any Territory or possession of the United States.

"(b) The term 'robbery' means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

"(c) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"SEC. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

"SEC. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both."

C

The Hobbs Act, 18 U. S. C. §1951, as amended in 1948, provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

"(b) As used in this section—

"(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

"(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, section 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45."